

# Extraterritorial Lockouts in Sports: How the Alberta Labour Board Erred in Declining Jurisdiction over the NHL

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## INTRODUCTION

Labor related work stoppages are becoming an epidemic in the four major American sports leagues, the National Hockey League (NHL), National Basketball Association (NBA), Major League Baseball (MLB) and National Football League (NFL).<sup>1</sup> With the successful use of player strikes and several successful antitrust challenges, 1970–2000 was a period of significant player gains in the form of free agency rights and salary increases.<sup>2</sup> Yet the past ten years represent a period of substantial owner take-backs, largely through the use of owner-imposed lockouts.<sup>3</sup> This trend began when the NHL took the extreme step of cancelling the entire 2004–05 season in order to impose a hard cap on player salaries. In 2011, both the NFL and NBA locked out their players and achieved reductions in the percentage of league revenues paid to their players.<sup>4</sup> The NFL even survived an antitrust challenge to its lockout, defeating the players' previously powerful negotiation

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1. The NHL and the NHL Players' Association (NHLPA) have had four work stoppages in the past twenty years: one players' strike in 1992 and three owner lockouts in 1994, 2004 and 2012. The NBA owners have locked out the National Basketball Players Association (NBPA) four times in the past seventeen years: in 1995, 1996, 1998, and 2011. The MLB has had relative labor peace with the MLB Players' Association (MLBPA) since 1995, following six work stoppages between 1973 and 1994. The NFL had three players' strikes in 1974, 1982 and 1987, before locking out the NFL Players' Association (NFLPA) in 2011. For a brief overview of these work stoppages, see Alexandra Baumann, Note, *Play Ball: What Can be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On*, 32 NAT'L ASS'N L. JUD. 251 (2012).

2. See e.g., *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (holding the antitrust labor exemption to be inapplicable where provision does not result from bona-fide arms-length bargaining); *Phila. World Hockey Club v. Phila. Hockey Club, Inc.*, 351 F.Supp. 462, 515 (E.D. Penn. 1972) (preventing NHL from enforcing "reserve clause" against players wishing to play in new league); *Major League Baseball Players Ass'n v. Twenty Six Major League Baseball Clubs*, Grievance No. 88-1 (1990) (Nicolau, Arb.) (finding that MLB owners colluded to suppress free agency between 1985-87).

3. See e.g., Dave Zirin, *Meet the Lockout Lawyers Destroying Sports*, THE NATION (Oct 15, 2012), <http://www.thenation.com/blog/170585/meet-lockout-lawyers-destroying-sports#> (last visited Oct. 5, 2013).

4. Patrick Rishe, *NHLPA Will be Lucky if New Revenue Split Mirrors NFL, NBA Models*, FORBES.COM (Aug 19, 2012), <http://www.forbes.com/sites/prishe/2012/08/19/nhlpa-will-be-lucky-if-new-revenue-split-mirrors-nfl-nba-models>.

tool.<sup>5</sup> Following this playbook, the NHL again locked out its players in 2012–13, demanding that the players take a smaller share of league revenues and looking to further capitalize on gains from the 2004–05 lockout.<sup>6</sup>

Work stoppages in sports leagues affect more than just the owners, the players and the disappointed fans. The 2012–13 NHL lockout resulted in the cancellation of 510 NHL games spread throughout the United States and Canada.<sup>7</sup> NHL games stimulate the economy beyond the money divided between the owners and the players—consider, for example, the restaurants and bars surrounding arenas that rely on games to generate business,<sup>8</sup> and the middle-class workers who keep the franchises running.<sup>9</sup> The lockout also affected sales of merchandise and goods of NHL sponsors who rely on games to advertise their products.<sup>10</sup> Finally, the lockout damaged the newly branded NBC Sports Network's hopes of building a cable sports competitor to ESPN, despite NBC agreeing to pay at least \$1.8 billion to land the NHL as its featured content.<sup>11</sup>

The bargaining relationship between the NHL and the National Hockey League Players' Association (NHLPA), like those of other major sports leagues, is largely

5. *Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011) (denying the players' request for an injunction to stop the lockout pending a hearing on the merits of their antitrust claim). Unable to get an injunction, the players settled rather than wait for an extended period of time to litigate their antitrust claim. For more information on antitrust injunctions in the sports bargaining context, see Daniel Belke, Note, *Blitzing Brady: Should Section 4(A) of the Norris-Laguardia Act Shield Management from Injunctions in Labor Disputes*, 113 COLUM. L. REV. 53 (2013). The NBA players also decertified their union and filed an antitrust challenge to the lockout, but the sides reached an agreement before the case was decided. See First Amended Class Action Complaint, *Anthony v. Nat'l Basketball Assoc.*, No. 11-03352-PJS-SER, 2011 WL 7447498 (D. Minn. Nov. 21, 2011); Howard Beck, *N.B.A. Reaches Tentative Deal to Save Season*, N.Y. TIMES, Nov. 27, 2011, at A1.

6. The players eventually accepted 50% of revenues in 2013, a 12.3% reduction in revenues from the 57% of revenues they received in 2011–12 (i.e. 7 divided by 57 makes 12.3). See Kevin Allen, *NHL, Players Finalize Agreement, Camps Can Open Sunday*, USATODAY.COM (Jan 12, 2013), <http://www.usatoday.com/story/sports/nhl/2013/01/12/nhl-players-ratification-vote/1828151>.

7. The NHL regular season is normally an eighty-two game schedule. After the lockout, the NHL played an abbreviated forty-eight game schedule. That means each of the thirty teams lost thirty-four games. The NHL's thirty teams, times thirty-four games, divided by two teams per game, equals 510 total games lost. *Id.*

8. Mitch Dudek, *Hockey Lockout Leaves Bars near United Center Thirsting for Fans*, CHICAGO SUN-TIMES (December 24, 2012, 8:56 PM), <http://www.suntimes.com/news/metro/17119416-418/hockey-lockout-leaves-bars-near-united-center-thirsting-for-fans.html>; Associated Press, *Study: Lockout Hits Canadian Merchants Near Arenas*, USATODAY.COM (Dec 4, 2012), <http://www.usatoday.com/story/sports/nhl/2012/12/04/study-lockout-hits-canadian-merchants-near-arenas/1747025>.

9. Brad Stubits, *Panthers, Senators Lay Off Employees as Lockout Begins*, CBSSPORTS.COM (Sept 18, 2012), <http://www.cbssports.com/nhl/blog/eye-on-hockey/20222626/nhl-lockout-panthers-senators-lay-off-employees-as-lockout-begins>.

10. Greg Wyshynski, *How NHL Lockout is Hurting Key Sponsors, During Holidays and in the Future*, YAHOO SPORTS (Nov 26, 2012), <http://sports.yahoo.com/blogs/nhl-puck-daddy/nhl-lockout-hurting-key-sponsors-during-holidays-future-182239574-nhl.html>.

11. Michael Hiestand, *NHL Lockout Hurts Fledgling NBC Sports Network*, USATODAY.COM (Sept 16, 2012), <http://usatoday30.usatoday.com/sports/columnist/hiestand-tv/story/2012/09/16/nhl-lockout-hurts-fledgling-nbc-sports-network/57792160/1>. All dollar values in this Note are in American Dollars.

governed by United States labor law.<sup>12</sup> But the NHL also has seven Canadian teams, and Canadian labor law is generally much more restrictive than American law with regards to allowing work stoppages.<sup>13</sup> This difference creates a jurisdictional labor policy conflict, which will be the focus of this Note. The U.S. National Labor Relations Board (NLRB) has asserted jurisdiction over issues concerning the entire league, including work stoppages and union certification.<sup>14</sup> However, NLRB jurisdiction over the actions of the Canadian teams is a gray area, as the U.S. National Labor Relations Act (NLRA) does not extend extraterritorially.<sup>15</sup> Moreover, any NLRB jurisdiction exerted over the actions of Canadian teams is necessarily incomplete, because the NLRB lacks any authority in Canada. The NLRB can only influence Canadian teams' actions insofar as it can influence the NHL as a joint venture of all teams, American and Canadian.

Looking to exploit this cross-border policy conflict, the NHLPA attempted to stop the 2012–13 NHL lockout under the more restrictive Canadian work stoppage rules by filing an illegal lockout charge against the NHL with the Alberta Labour Relations Board (ALRB). This charge would have applied only to the NHL's two Alberta teams, the Edmonton Oilers and the Calgary Flames. The NHLPA hoped that the broader NHL lockout would be crippled if these two mid-market teams were forced to pay their players, despite not bringing in any revenue from playing games. If the ALRB had declared the lockout illegal, it would have tilted the bargaining relationship toward the players. More importantly, it would have almost certainly shortened the lockout, which would have been good for fans and for the economy. It might also have disincentivized work stoppages in other sports leagues, since the NBA, MLS and MLB all have Canadian teams.<sup>16</sup>

Unfortunately, the ALRB refused even to decide whether it had jurisdiction over the matter, simply describing jurisdiction as "ambiguous," before declining to intervene on discretionary grounds. This Note argues that the ALRB erred by not holding that it had jurisdiction over the actions of the Flames and the Oilers. Further, as a matter of policy, even declining jurisdiction would have been preferable to this ambiguous result.<sup>17</sup> Part I of this Note recounts the history of the

12. See *National Hockey League Players' Ass'n v. Edmonton Oilers Hockey Corp.*, 2012 CanLII 58944, para. 8 (Can. Alta. L.R.B.). U.S. labor law is a federal system administered by the National Labor Relations Board (NLRB).

13. See Bernard Adell, *Resisting Lower Terms for Imported Workers*, 32 COMP. LAB. L. & POL'Y J. 1023, 1030 (2011).

14. See generally Motion to Dismiss at Appendix A, *Edmonton Oilers*, 2012 CanLII 58944. For a description of the NLRB action to take jurisdiction of the entire National Basketball Players' Association bargaining unit, including players on Canadian teams, see William B. Gould, *Labor Law Beyond U.S. Borders*, 21 STAN. L. & POL'Y REV. 401, 405-06 (2010).

15. See *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168, 180 (3d Cir. 2004); Gould, *supra* note 14, at 403-05.

16. Major League Soccer (MLS) narrowly escaped a threatened strike by the players after the league's first CBA expired in 2010. The players ultimately signed a new five-year deal. *MLS Avoids Strike with 5-Year CBA*, ESPN FC (Mar 20, 2010), <http://soccernet.espn.go.com/news/story?id=758671&sec=mls&cc=5901>.

17. "[E]mployees and employers are best able to manage their affairs where statutory rights and responsibilities are clearly established and understood." Alberta Labour Relations Code, R.S.A. 2000, c.

NHL-NHLPA bargaining relationship. Part II discusses past case law involving Canadian labor boards' jurisdiction over North American sports bargaining relationships. Part III evaluates the labor policy considerations regarding the Board's failure to decide whether it had jurisdiction over the NHL-NHLPA bargaining relationship. Finally, Part IV discusses and dismisses the Board's proposed obstacles to ALRB jurisdiction over the bargaining relationship, arguing that while there may have been reasons for the Board not to intervene, particularly in the first month of the lockout, none of those reasons should affect whether the Board has the authority to intervene in the future.<sup>18</sup>

## I. THE NHL-NHLPA BARGAINING RELATIONSHIP

The NHL is an unincorporated association of hockey clubs in North America with its headquarters in New York, New York.<sup>19</sup> The NHL currently includes thirty clubs; twenty-three teams are located in the United States and seven teams are located in five Canadian Provinces.<sup>20</sup> The players are represented by the NHLPA, headquartered in Toronto, Ontario, Canada.<sup>21</sup> After prior attempts at certification failed, the NHLPA successfully gained recognition from the NHL in 1967 by threatening to seek certification under Canadian labor law with the notorious Teamsters Union.<sup>22</sup> The owners agreed to recognize the NHLPA, run by players and agents, in order to avoid dealing with the Teamsters.<sup>23</sup>

The NHL-NHLPA relationship remained cordial through the early 1990s under original executive director Alan Eagleson.<sup>24</sup> However, amid limited player

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L-1, Preamble (Can.).

18. For example, the Board may not have intervened because it didn't want "the tail to wag the dog," because of a desire to give deference to NLRB remedies or because of fear of a reprisal from the NHL that might affect Albertan commerce. See discussion *infra* Part IV.

19. Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, at 1 (July 22, 2005), available at <http://www.nhl.com/cba/2005-CBA.pdf>; Complaint at 4, *National Hockey League Players' Assoc'n v. Edmonton Oilers Hockey Corp.*, 2012 CanLII 58944 (Can. Alta. L.R.B.).

20. Teams, NHL.COM, <http://www.nhl.com/ice/teams.htm?nav=tms-main> (last visited Sept. 29, 2013). The twenty-three American teams are spread across sixteen states and the District of Columbia. New York and California each have three franchises. The seven Canadian teams, along with their respective provinces, are: the Vancouver Canucks (British Columbia), the Calgary Flames and Edmonton Oilers (Alberta), the Winnipeg Jets (Manitoba), the Toronto Maple Leafs and Ottawa Senators (Ontario), and the Montreal Canadiens (Quebec).

21. Complaint at 4, *Edmonton Oilers*, 2012 CanLII 58944.

22. PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 132 (2000); Mathieu Fournier & Dominic Roux, *Labor Relations in the National Hockey League: A Model of Transnational Collective Bargaining?*, 20 MARQ. SPORTS L. REV. 147, 154 (2009); Inside NHLPA, NHLPA.COM, <http://www.nhlpa.com/inside-nhlpa> (last visited Sept. 29, 2013). The Teamsters have a reputation for being a very powerful and influential union. Particularly during the 1960s and 1970s, the Teamsters' power was enhanced by ties to organized crime through their then-union president Jimmy Hoffa, who famously and mysteriously disappeared in 1975. See e.g., CHARLES BRANDT, "I HEARD YOU PAINT HOUSES": FRANK "THE IRISHMAN" SHEERAN AND THE INSIDE STORY OF THE MAFIA, THE TEAMSTERS, AND THE LAST RIDE OF JIMMY HOFFA (2004).

23. WEILER, *supra* note 22.

24. See Jordan I. Kobritz & Jeffery F. Levine, *Don Fehr Leads the NHLPA: Does the NHL Have*

contractual gains, constant rumors about Eagleson's friendships with owners and investigative journalistic reports characterizing Eagleson's leadership as "self-dealing," Eagleson resigned as executive director in 1992.<sup>25</sup> The NHLPA then promoted former Eagleson assistant Bob Goodenow, who immediately sought to distance the NHLPA from the Eagleson era and to establish an adversarial tone to negotiations.<sup>26</sup> After beginning the 1991-92 season without a new collective bargaining agreement (CBA), Goodenow led the first ever NHLPA strike on April 1, 1992.<sup>27</sup> The strike took place just a week before playoffs were scheduled to start, placing millions of potential revenue dollars in jeopardy.<sup>28</sup> The strike ultimately lasted only ten days, with the owners giving major concessions in order to save the playoffs.<sup>29</sup> The owners' single success was retaining the right to reopen negotiations following the 1992-93 season, allowing them a chance to quickly reduce players' gains during the next negotiation.<sup>30</sup>

The players' power-grab strike during the 1992 negotiation left the NHL owners irritated.<sup>31</sup> Further, rising player salaries caused the owners to worry about labor costs and the effect that those costs would have on future franchise fees.<sup>32</sup> The NHL was intent on establishing a salary cap to limit salary growth, similar to one

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*Anything to Fear?*, 11 VA. SPORTS & ENT. L.J. 178, 183 (2011).

25. See *id.* at 188, 189. My favorite story about Alan Eagleson is the rumor that Eagleson agreed to collective bargaining agreement terms with NHL owners in private, and then scripted bargaining sessions for the benefit of the players. BRUCE DOWBIGGIN, *MONEY PLAYERS: THE AMAZING RISE AND FALL OF BOB GOODENOW AND THE NHL PLAYERS ASSOCIATION* 59-60 (2006). For more information on Alan Eagleson's leadership of the NHLPA, see RUSS CONWAY, *GAME MISCONDUCT: ALAN EAGLESON AND THE CORRUPTION OF HOCKEY* (1997).

26. See Kobritz & Levine, *supra* note 24, at 190.

27. The strike vote passed overwhelmingly, 560 to 4. Kobritz & Levine *supra* note 24, at 190; DOWBIGGIN, *supra* note 25, at 132. The players described the motivation for the strike as one of fairness after the reports of NHL owners' prior backroom dealings with Alan Eagleson. See Mike Kiley, *NHL Strike One Huge Power Play*, CHI. TRIB. (Apr. 2, 1992), [http://articles.chicagotribune.com/1992-04-02/sports/9201300694\\_1\\_national-hockey-league-owners-owners-spokesman-strike-wednesday-afternoon](http://articles.chicagotribune.com/1992-04-02/sports/9201300694_1_national-hockey-league-owners-owners-spokesman-strike-wednesday-afternoon) ("The players want something money can't buy—respect and more control of their fate. They feel that if they were not exactly cheated out of their just due for years under former union leader Alan Eagleson, considered a longtime owners' pawn, there is plenty of room for owners to expand their hearts as well as their pocketbooks and allow the players added influence." Blackhawk defenseman Steve Smith is quoted as saying, "Money's not the only issue. It's unfortunate we are negotiating in recessionary times, but if my neighbor asks me why I'm on strike, I can honestly say it's for more than economics. It's for fairness.").

28. See Kiley, *supra* note 27.

29. See Kobritz & Levine, *supra* note 24, at 190-91 ("Players won concessions such as the right to choose independent arbitrators for salary disputes, a reduction in the age for unrestricted free agency from thirty one to thirty, and an increase in the players' postseason revenue share. All of these gains were made without the players having to agree to a salary cap.").

30. See *id.* at 191.

31. See Kiley, *supra* note 27 (Hawks Senior Vice President Bob Pulford, a member of the owners' negotiating committee, said during the strike, "There's no doubt [the players] are making management rights an issue. But if they are going on strike because they have been treated poorly in the past, it makes no sense. We're not going to let the tail wag the dog. It's the owners' money that makes the league. We should have complete control.").

32. See DOWBIGGIN, *supra* note 25, at 167-68. A Franchise Fee is a payment from new owners to the existing owners in order to buy a new team into the league brand.

successfully implemented by NBA team owners.<sup>33</sup> During the final months of the expiring strike-induced CBA, the NHL hired NBA senior vice president and general counsel Gary Bettman, who had a reputation for limiting player salaries and free agent rights.<sup>34</sup> Bettman became the first NHL commissioner, uniting the responsibilities of the NHL president and those handled by various owner-run committees, setting the table for a Bettman–Goodenow showdown over player salaries.<sup>35</sup>

Bettman and Goodenow negotiated through the 1993–94 season without a CBA in place, but were unable to reach an agreement.<sup>36</sup> By this point, player salaries had more than tripled in the previous five years.<sup>37</sup> With bargaining tensions growing, and with the NHL fearful of another mid-season players strike, the owners chose preemptively to lock the players out.<sup>38</sup> The owners were determined to achieve cost certainty on player salaries by ending salary arbitration and implementing a luxury tax that functioned as a salary cap.<sup>39</sup> Yet through months of negotiations, during which the players went without paychecks, the NHLPA still refused to accept a salary cap.<sup>40</sup> A number of owners simply could not accept losing an entire season to a labor dispute.<sup>41</sup> The league dropped its salary cap demand, settling instead for a rookie salary cap and a limitation on player arbitration rights.<sup>42</sup> The NHL played a shortened 1994–95 season and Bettman set out to correct the lack of owner unity that felled the lockout.

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33. See Joe Lapointe, *N.H.L. Considers an N.B.A. Officer*, N.Y. TIMES, Nov. 29, 1992, at A3 (“In the N.H.L., the salary cap could become a major issue in the bargaining for a new collective bargaining agreement to replace the one that expires after this current season. Many hockey owners have expressed admiration and a little envy over how the N.B.A. has prospered for the last dozen years while the N.H.L. has stagnated, relatively, as a business. Part of the N.B.A.’s prosperity is due to its salary cap, which limits overall team wages.”).

34. See Jeff Jacobs, *NHL Picks Bettman as First Commissioner*, HARTFORD COURANT, DEC 12, 1992, at B1. Between Bettman’s lack of hockey background and leading his third NHL owner lockout as Commissioner in 2012, Bettman is summarily booed nearly every time he addresses NHL fans. See generally Erik Cotton, *Will Gary Bettman Ever Be Able to Gain Favor with NHL Fans?*, BLEACHERREPORT.COM (Oct. 24, 2012), <http://bleacherreport.com/articles/1382428-will-gary-bettman-ever-be-able-to-gain-favor-with-nhl-fans>; Bettman Boo Montage, YOUTUBE.COM (June 15, 2009), <http://www.youtube.com/watch?v=jQqkxNSWZ0>.

35. See Thomas Arkell, Note, *National Hockey League Jurisprudence: Past, Present and Future*, 8 SETON HALL J. SPORT L. 135, 136 (1998); Jacobs, *supra* note 34.

36. See Kobritz & Levine, *supra* note 24, at 191.

37. See WEILER, *supra* note 22, at 111 (noting an increase in average NHL salaries from \$180,000 in 1987–88 to \$570,000 in 1993–94).

38. See Kobritz & Levine, *supra* note 24, at 191.

39. See *id.* For an in-depth analysis of the competitive effect of the salary cap on the NHL, see Stephen F. Ross, *The NHL Labour Dispute and the Common Law, the Competition Act, and Public Policy*, 37 U.B.C. L. REV. 343, 399 (2004) (arguing that the salary cap reduces value and quality by restraining competition and restricting the amount that bad teams can improve each season).

40. The NHLPA instead suggested the use of revenue sharing between large and small market clubs to assure competitive balance in the face of rising salaries. See Frances Romero, *The 1994 Hockey Lockout*, TIME (Mar 4, 2011), <http://keepingscore.blogs.time.com/2011/03/04/top-10-u-s-sports-strikes-and-lockouts/slide/the-1994-hockey-lockout>.

41. See Kobritz & Levine, *supra* note 24, at 192.

42. See Romero, *supra* note 40.

As the successor NHL-NHLPA CBA neared expiration in 2003–04, Bettman prepared for another attempt at gaining cost-certainty through implementation of a salary cap.<sup>43</sup> Player salaries had once again tripled in the intervening ten years, to an average of \$1.8 million per player.<sup>44</sup> This growth outpaced the growth of league revenues, with the league claiming that player salaries now amounted to seventy-five percent of revenues.<sup>45</sup> When Bettman announced another lockout on September 15, 2004, he referenced the NHL's \$1.8 billion in operating losses and the bankruptcy filings of four teams over the past ten years.<sup>46</sup> Bettman was resolute, claiming that the NHL would lose less money by not playing the season at all than by playing under the then-current rules.<sup>47</sup> Bettman again insisted the lockout would not end without a salary cap and cost certainty for the owners.<sup>48</sup> As he announced the beginning of the lockout in the fall of 2004, Bettman openly discussed the possibility that the lockout could run into the 2005–06 season and potentially interfere with the Winter Olympics in February 2006.<sup>49</sup>

In response to Bettman's bravado, Goodenow maintained his no-salary-cap stance from the previous lockout, stating that "[u]ntil [Bettman] gets off the salary-cap issue, there's not a chance for us to get an agreement."<sup>50</sup> The union was willing to make concessions in response to the financial conditions of the league, but it greatly disputed the NHL's numbers.<sup>51</sup> Ultimately, the union rejected the

43. Bettman had been preparing and trying to unite the owners for ten years. Part of his plan involved using the media to spread a united message from the owners about hockey's need for a salary cap. See Jeffery F. Levine & Bram A. Maravent, *Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season?*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1419, 1453 (2010). Bettman prohibited owners from speaking publicly about the lockout. This included fining Steve Belkin, part owner of the Atlanta Thrashers, for commenting on the possibility of using replacement players. See Joe Lapointe, *Owner is Criticized for Talking of Replacement Players*, N.Y. TIMES, Oct 13, 2004, at D5.

44. Bob Foltman, *That Caps It: Lockout's On; CBA Expires; No NHL Talks Slated*, CHI. TRIB., Sept. 16, 2004, at 4.6; Joe Lapointe, *Lockout Is First Shot In Hockey's Labor War*, N.Y. TIMES, Sept. 16, 2004, at D1. Compare to 1993–94 salary of \$570,000. See WEILER, *supra* note 22, at 111.

45. Arthur Levitt Jr., Independent Review of the Combined Financial Results of the National Hockey League 2002–2003 Season (Feb 5, 2004), available at <http://www2.nhl.com/images/levittreport.pdf>. See also Jonathan D. Glater, *N.H.L.'s Financial Analysis Reveals Significant Losses*, NYTIMES.COM (Feb 13, 2004), <http://www.nytimes.com/2004/02/13/sports/hockey-nhl-s-financial-analysis-reveals-significant-losses.html>; Kobritz & Levine, *supra* note 24, at 193.

46. Those teams were Buffalo, Los Angeles, Ottawa and Pittsburgh. See Associated Press, *No Deal in Sight, NHL Owners Lock Out Players*, SPORTSILLUSTRATED.COM (Sept 16, 2004), <http://sportsillustrated.cnn.com/2004/hockey/nhl/09/15/bc.hkn.nhllockout.ap/index.html>.

47. See Foltman, *supra* note 44.

48. *No Deal in Sight, NHL Owners Lock Out Players*, *supra* note 46 (Bettman is quoted, "[t]he union is trying to win a fight, hoping that the owners will give up. That will turn out to be a terrible error in judgment. They are apparently convinced that [at] some point in the season, the owners' resolve will waver, and I'm telling you that is wrong, wrong, wrong.").

49. See *id.*

50. *Id.*

51. See Paul D. Staudohar, *The Hockey Lockout of 2004-05*, MONTHLY LAB. REV. 23, 25 (Dec. 2005) (noting the union's criticism of the league figures as underreporting hockey revenue, and citing a *Forbes* magazine article suggesting salaries accounted for sixty-six percent of revenue, rather than seventy-six percent); Foltman, *supra* note 44 (suggesting that the players were already willing to accept a limited luxury tax, a salary rollback and reduced entry level pay scale at the beginning of the lockout).

owners' final offer, which included a salary cap of \$42.5 million per team but not a strict cost certainty provision.<sup>52</sup> On February 16, 2005, the NHL became the first major American sports league to cancel an entire season because of a labor dispute.<sup>53</sup>

Mirroring the ownership disunity in the 1994–95 lockout, there was considerable discord among the players prior to the cancellation of the 2004–05 season.<sup>54</sup> Many players felt that the NHLPA should have accepted the possibility of a salary cap much earlier and attempted to achieve the best deal possible under that framework.<sup>55</sup> With the growing fear of replacement players and the shock from losing the season, the union began to show cracks publicly.<sup>56</sup> Once the NHL released its gag order and allowed owners to contact players directly, star players went on the record as willing to accept a salary cap. After that, the union had no choice but to settle.<sup>57</sup> Goodenow was discredited for his failed no-salary-cap strategy, and NHLPA second-in-command Ted Saskin stepped forward as the voice of reason.<sup>58</sup> On July 13, 2005, the two sides signed a new six-year CBA, which contained both a twenty-four percent, across-the-board roll back in player contracts and a salary cap with a cost certainty provision.<sup>59</sup>

Initially, both the players and owners viewed the 2005 agreement as a very pro-management deal and a huge win for the owners.<sup>60</sup> In its aftermath, the NHLPA fell into a period of turmoil. A large group of players brought legal action against the union, challenging Ted Saskin's role in the negotiation of the new CBA.<sup>61</sup> The action was ultimately unsuccessful, but continued infighting caused the NHLPA to

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52. To add some context, the average team payroll had been \$41 million the prior year. Michael K. Ozanian, *Ice Capades*, FORBES.COM (Nov 29, 2012), <http://www.forbes.com/forbes/2004/1129/124.html>. A "cost-certainty" provision is a way of directly linking a salary cap to league revenues. The provision eventually agreed to required owners to hold a portion of players' salaries in escrow during the season until a final calculation of league revenues could be made, to assure that salaries did not exceed the players allotted percentage. See Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, at 151, 195 (July 22, 2005), available at <http://www.nhl.com/cba/2005-CBA.pdf>. Once the league offered a cap without cost certainty, the NHLPA made a final offer including a salary cap of \$49 million. See Joe Lapointe, *League Cancels Hockey Season in Labor Battle*, N.Y. TIMES, Feb 17, 2005 at A1.

53. *League Cancels Hockey Season in Labor Battle*, *supra* note 52.

54. See Kobritz & Levine, *supra* note 24, at 195.

55. See *id.*

56. See Staudohar, *supra* note 51, at 27.

57. See *id.*

58. Goodenow resigned after the players ratified the new CBA. See Kobritz & Levine, *supra* note 24, at 196, 198.

59. The salary cap for the first year of the deal was \$39 million per team. There was also a minimum salary (floor) of \$21 million per team. The players made gains in the liberalization of free-agency rules, but most of the other changes were viewed as pro-owner (e.g. new entry level contract limits and a maximum contract value tied to the salary cap). See Staudohar, *supra* note 51, at 27.

60. See *id.* at 28; Kobritz & Levine, *supra* note 24, at 197.

61. See *Chelios v. NHL Players' Ass'n*, 2007 U.S. Dist. LEXIS 4260 (N.D. Ill. Jan. 20, 2007). The players alleged, among other counts, that Saskin illegally negotiated a salary cap into the CBA against the wishes of the players and illegally took control of the NHLPA. *Id.* at \*5. The suit was dismissed without prejudice for lack of personal jurisdiction and *forum non conveniens*, with leave to re-file in Ontario, Canada. *Id.* at \*30.



fire four executive directors in less than five years.<sup>62</sup> Eventually, former Major League Baseball Players Association (MLBPA) Director Donald Fehr was hired as an adviser to add stability, eventually becoming the NHLPA's executive director.<sup>63</sup> Fehr had a reputation from his time in baseball for both taking on management and creating labor peace through his hard stances.<sup>64</sup>

Despite the pro-owner bent of the 2005 CBA and the NHLPA's disorganization, when the agreement expired in September 2012, league revenues and player salaries were both at their highest levels ever.<sup>65</sup> The league had just signed a lucrative deal to be the featured content on the new NBC Sports Network;<sup>66</sup> further, players were now receiving fifty-seven percent of revenues—up from the original fifty-four percent—because of escalation provisions related to revenue growth.<sup>67</sup> As the CBA expired, the major issues driving negotiations were: (1) the league as an entity was making so much money that small-market teams were having trouble staying above the ever-rising minimum salary threshold,<sup>68</sup> and (2) the battle between the NHL and individual teams over signing contracts that the NHL felt were structured to circumvent its hard-won player salary cap.<sup>69</sup>

A year earlier, the NHL watched the NFL and NBA use lockouts to limit their players' revenue share to fifty percent or less.<sup>70</sup> Despite having sacrificed the

62. In chronological order: Bob Goodenow (Associated Press, *NHLPA Leader Goodenow Leaves After 15 Years*, ESPN.COM (July 29, 2005), <http://sports.espn.go.com/nhl/news/story?id=2118641>); Ted Saskin (Associated Press, *Saskin Fired as NHLPA Executive Director*, WASHINGTONPOST.COM (May 10, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/10/AR2007051001798.html>); Paul Kelly (Jeff Z. Klein, *N.H.L. Players Union Dismisses its Director*, N.Y. TIMES, Sept. 1, 2009, at B1); Ian Penny (Pierre LeBrun & Scott Burnside, *Penny Leaves NHLPA*, ESPN.COM (Oct 31, 2009), <http://sports.espn.go.com/nhl/news/story?id=4609127>).

63. See Jim Kelley, *Fehr's the Right Man for the NHLPA*, SPORTSILLUSTRATED.COM (Aug 26, 2010), [http://sportsillustrated.cnn.com/2010/writers/jim\\_kelley/08/26/fehr.nhlpa/index.html](http://sportsillustrated.cnn.com/2010/writers/jim_kelley/08/26/fehr.nhlpa/index.html).

64. See *id.*

65. The CBA was extended a seventh year by NHLPA option. For revenue and salary info see *NHL Lockout 2012: Gary Bettman Makes Plea in Defense of Owners' Stand*, SPORTING NEWS (Sept 13, 2012), <http://aol.sportingnews.com/nhl/story/2012-09-13/nhl-lockout-2012-gary-bettman-donald-fehr-labor-collective-bargaining-agreement-> (citing league revenues of \$3.3 billion and average salary of \$2.55 million).

66. Bob Condor, *NHL, NBC Sign Record-Setting 10-year TV Deal*, NHL.COM (Apr 19, 2011), <http://www.nhl.com/ice/news.htm?id=560238>.

67. Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, at 193–94 (July 22, 2005), available at <http://www.nhl.com/cba/2005-CBA.pdf>.

68. Michael Traikos, *NHL Teams Scheming to Stay Above Salary Floor*, NATIONAL POST (Jun 11, 2012), <http://sports.nationalpost.com/2011/06/29/nhl-teams-scheming-to-stay-above-salary-floor>.

69. Under the 2005–12 CBA, the salary cap was tied to a player's average salary. Teams began adding extra years at the end of contracts, after a typical player's retirement age, at very low salaries to bring down the cap hit over the length of the deal. The final straw was a seventeen-year, \$102 million dollar contract between the New Jersey Devils and Ilya Kovalchuk, where only \$3 million was to be paid in the final six years. The salary cap hit as structured was \$6 million per year. Without the final six years, it would have been \$9 million per year. See Nat'l Hockey League v. Nat'l Hockey League Players' Ass'n, Aug 9, 2010 (Bloch, Arb.); Associated Press, *Devils Penalized Over Kovalchuk Deal*, ESPN.COM (Sept 13, 2012), <http://sports.espn.go.com/new-york/nhl/news/story?id=5569258>.

70. See Patrick Rishe, *NHLPA Will be Lucky if New Revenue Split Mirrors NFL, NBA Models*,

entire 2004–05 season to achieve cost certainty, the owners' still viewed the players' salaries as exorbitant.<sup>71</sup> On September 16, 2012, after the players rejected an owner proposal to reduce the players' revenue share by nearly ten percentage points, the NHL responded by again locking out the players.<sup>72</sup> The owners showed the same aversion to dealing with the strong and resistant union as they in 1994 and 2004,<sup>73</sup> but this lockout had a different feel. Previously, the owners argued that a salary cap was necessary to save the league. Now, the NHL was financially sound; the owners simply wanted to pay the players less, and they knew that the best way to achieve that goal was to lock the players out and wait.<sup>74</sup>

During the 2004–05 and 2012–13 lockouts, the major issue was the division of the league's hockey related revenue (HRR).<sup>75</sup> One major obstacle to negotiations in 2004 was that many teams had real losses, but the players viewed the NHL's method of calculating losses as disingenuous, fueling the players' mistrust of the owners. For example, in order to calculate the claimed losses of \$224 million in 2003–04, the owners only included half of the \$17 million the New York Islanders received from cable broadcasts of their games, and included none of the \$15 million Chicago Blackhawks owner Bill Wirtz received from luxury suites at the United Center.<sup>76</sup> In order to resolve this problem, the 2005 CBA contained a detailed definition of HRR,<sup>77</sup> though some have suggested that definition is still underinclusive of the true financial benefit of owning an NHL team.<sup>78</sup> Team

FORBES.COM (Aug 19, 2012), <http://www.forbes.com/sites/prishe/2012/08/19/nhlpa-will-be-lucky-if-new-revenue-split-mirrors-nfl-nba-models>.

71. In fact, this view seems to have survived the 2012–13 lockout resolution. On the day the 2013 season began, outspoken Boston Bruins owner Jeremy Jacobs held a press conference in order to publicly blame the NHLPA for the lockout. Jacobs said, "The players are going to get very rich under this transaction. They were very rich going into this. They passed up \$700 million in payroll. That's a lot. And I'm hopeful that it was fulfilling." Jeff Z. Klein, *Comments by Bruins Owner Reflect Bitterness of Lockout*, N.Y. TIMES SLAP SHOT BLOG (Jan. 20, 2013), <http://slapshot.blogs.nytimes.com/2013/01/20/comments-by-bruins-owner-reflect-bitterness-of-lockout>.

72. See Chris Kuc, *NHL Owners Lock Out Players*, CHICAGOTRIBUNE.COM (Sept 16, 2012), [http://articles.chicagotribune.com/2012-09-16/sports/chi-with-no-labor-talks-nhl-lockout-looms-20120915\\_1\\_nhl-owners-lockout-nhl-deputy-commissioner](http://articles.chicagotribune.com/2012-09-16/sports/chi-with-no-labor-talks-nhl-lockout-looms-20120915_1_nhl-owners-lockout-nhl-deputy-commissioner).

73. See Nicholas J. Cotsonika, *Devellano Fined \$250K for Comments, Owners Enjoy Their Silence*, YAHOO! SPORTS (Sep 22, 2012), <http://sports.yahoo.com/news/nhl-devellano-fined-250k-for-comments-owners-enjoy-their-silence.html> (Red Wings Senior VP Jim Devellano is quoted as saying, "The owners can basically be viewed as the ranch, and the players, and me included, are the cattle. The owners own the ranch and allow the players to eat there. That's the way it's always been and the way it will be forever, and the owners simply aren't going to let a union push them around. It's not going to happen.").

74. See *Comments by Bruins Owner Reflect Bitterness of Lockout*, *supra* note 71 (After describing the salary cap achieved in 2004–05 as a positive for the league, Jacobs continued, "[t]he numbers were wrong, we just got the numbers wrong. We believe we have the numbers right now, and it took a lot, and it was very expensive to all of us getting them there.").

75. *Ice Capades*, *supra* note 52.

76. *Id.*

77. Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, at 160–84 (July 22, 2005), available at <http://www.nhl.com/cba/2005-CBA.pdf>.

78. See Jonathan Willis, *Why Do Billionaires Keep Buying Teams that Lose Money?*, EDMONTON J. (Nov. 16, 2012), <http://blogs.edmontonjournal.com/2012/11/16/nhl-lockout-why-do-billionaires-keep>.

ownership often comes with public funding for a new arena and a “sweetheart deal” operating that arena at a profit.<sup>79</sup> This means that owners could claim a small loss on their team under the HRR calculation while still turning a significant profit by virtue of team ownership. Further, the owners attempted to change the HRR calculation twice during the 2012 negotiation, once, according to reports, by simply making the change and hoping the NHLPA would not notice.<sup>80</sup> The mistrust growing from complicated HRR calculations and owners’ public comments about revenues contributed to significant animosity throughout the 2012–13 lockout.

## II. CANADIAN JURISDICTION OVER NORTH AMERICAN SPORTS BARGAINING RELATIONSHIPS

The history of the NHL bargaining relationship is only half of the relevant background heading into the illegal lockout charge before the Alberta Labour Board. There is a larger history of North American sports labor disputes crossing the United States–Canada border. When the ALRB denied the NHLPA’s illegal lockout application in 2012, the Board acted as if the case before it was unprecedented.<sup>81</sup> Yet, the same jurisdictional issues were raised in Ontario, Canada, three separate times in 1995: in the 1994–95 MLB<sup>82</sup> players’ strike, in the 1995 MLB umpire lockout and in the 1995 NBA referee lockout. None of these three disputes were even cited by the ALRB in its decision.<sup>83</sup> It will be helpful, nevertheless, to discuss these disputes and the Ontario Board’s previous

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buying-teams-that-lose-money (arguing “hockey-related revenue is defined in such a way as to show losses”).

79. See *id.* (using the example of the Florida Panthers).

80. See Stu Hackel, *What is Hockey Related Revenue?*, HOME ICE BLOG (Aug 8, 2012), <http://nhl-red-light.si.com/2012/08/08/what-is-hockey-related-revenue> (describing the NHL’s first offer, including a change to HRR allowing the deduction of arena management costs before determining players’ share); Stu Hackel, *Mistrust Shows up to Bedevil CBA Talks*, HOME ICE BLOG (Jan 3, 2013), <http://nhl-red-light.si.com/2013/01/03/mistrust-shows-up-to-bedevil-cba-talks> (describing the NHL’s attempt to “slip into” the deal a provision that removed harsh penalties for hiding HRR).

81. *National Hockey League Players’ Ass’n v. Edmonton Oilers Hockey Corp.*, 2012 CanLII 58944, para. 9 (Can. Alta. L.R.B.) (“The unique character of this dispute was emphasized by the dearth of directly on-point jurisprudence offered by the parties to assist the Board in resolving these questions.”).

82. Major League Baseball consists of the American League and National League. Historically, the leagues were separate, meeting only in the World Series. In 1997, however, the leagues started playing regular season games with one another, known as “interleague play.” See *All-Time Club Records in Interleague Play*, MLB.COM, <http://mlb.mlb.com/mlb/history/interleague/records.jsp> (last updated 2012); Lacie L. Kaiser, Note, *The Flight From Single-Entity Structured Sports Leagues*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 5 n.28 (2004). In 2000, the two leagues consolidated their administrations under the Commissioner’s Office. See MAJOR LEAGUE CONST. art. II, § 2(f), available at <http://bizofbaseball.com/docs/MLConstitutionJune2005Update.pdf>; *The Commissionership: A Historical Perspective*, MLB.COM, [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com). For the purposes of this Note, I will refer to both leagues as the single entity “MLB,” despite the fact that the National League and American League were named separately as defendants in the Umpire case discussed *infra*. *Ass’n of Major League Umpires v. Am. League*, 1995 CanLII 10058, para. 13.9 (Can. Ont. L.R.B.).

83. See generally *Edmonton Oilers*, 2012 CanLII 58944.

interventions into NLRB-governed bargaining relationships in order to understand the problems with the Alberta Board's analysis, particularly their description of the issue as *sui generis*.

### A. THE 1994-95 MLB PLAYERS STRIKE

Like the NHL-NHLPA relationship, both the MLB's bargaining relationships with its players and umpires and the NBA's relationship with its referees are administered by the NLRB, despite some of the resulting employment taking place in Canada.<sup>84</sup> In 1995, the MLB had twenty-eight teams, two of which were Canadian: the Toronto Blue Jays in Ontario and the Montreal Expos in Quebec.<sup>85</sup> The NBA had twenty-nine teams, two of which were Canadian: the Toronto Raptors and the Vancouver Grizzlies.<sup>86</sup> Ontario provincial labor laws prohibited, with a few exceptions, the hiring of replacement workers to perform the work of striking or locked out employees.<sup>87</sup> Thus, Ontario Labour Relations Board (OLRB) jurisdiction became very important when, in 1995, the MLB and NBA considered using replacement workers during their respective work stoppages.

Major League Baseball started the 1994 season while negotiating a successor to the expired 1990-93 MLB-MLBPA agreement.<sup>88</sup> In August of 1994, with the season more than half over, the players went on strike, resulting in the cancellation of the 1994 World Series.<sup>89</sup> The following offseason, the owners declared a negotiation impasse and implemented owner-friendly provisions to the CBA, including a salary cap and elimination of the players' arbitration rights.<sup>90</sup> The MLB planned to open the 1995 season under these new rules despite the strike, even holding try-outs and starting spring training with replacement players.<sup>91</sup> However, the players won an unfair labor practice charge before the NLRB, and subsequently, a federal court injunction prevented the owners from starting the

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84. See *Silverman v. Major League Baseball Players Relations Comm., Inc.*, 880 F. Supp. 246, 250 (S.D.N.Y. 1995) *aff'd*, 67 F.3d 1054 (2d Cir. 1995); *Major League Umpires*, 1995 CanLII 10058; *Nat'l Basketball Referees Ass'n v. Nat'l Basketball Ass'n*, 1995 CanLII 10011 (Can. Ont. L.R.B.).

85. See Hal Bodley, *Selig Confirms Expos' Move*, USA TODAY (Sept. 29, 2004), [http://usatoday.com/sports/baseball/nl/expos/2004-09-29-washington-move\\_x.htm](http://usatoday.com/sports/baseball/nl/expos/2004-09-29-washington-move_x.htm); *MLB Season History - 1994*, ESPN.COM, [http://espn.go.com/mlb/history/season/\\_year/1994](http://espn.go.com/mlb/history/season/_year/1994) (last visited Oct. 6, 2013) (confirming that the Expos moved to Washington D.C. in 2005, leaving Toronto as the only MLB team in Canada).

86. See *1995-96 Standings*, NBA.COM, <http://www.nba.com/history/standings/19951996.html> (last visited Oct. 6, 2013).

87. See Ontario Labour Relations Act, 21 R.S.O. 1990 § 73.1 (Can.), available at <http://canlii.ca/en/on/laws/stat/rso-1990-c-12/52694/rso-1990-c-12.html>. See also *Major League Umpires*, 1995 CanLII 10058, para. 13.9. This provision has since been repealed. See Ontario Labour Relations Act, S.O. 1995, ch. 1, Sch. A. § 43.15 (Can.); Adell, *supra* note 13, at 1036.

88. See *Silverman*, 880 F. Supp. at 251.

89. See *id.*; Murray Chass, *Baseball Owners Quit Fight; Opening Day is Set for April 26*, N.Y. TIMES, April 3, 1995, at A1.

90. *Silverman*, 880 F. Supp. at 252.

91. Ross Newhan, *Strike Throws Curve into Start of Spring Training*, L.A. TIMES, Feb. 16, 1995, at A1.

1995 season with replacement players.<sup>92</sup> Following the injunction, on the day the replacement-player season was to have begun, the players offered to return to work under the rules of the expired CBA, and the owners accepted.<sup>93</sup> This resolution represented a de-escalation by the owners, who had threatened to lock the players out if they attempted to end the strike without accepting a new agreement.<sup>94</sup> Instead, the league delayed the start of the season and played a shortened 144 game schedule without a new CBA in place.<sup>95</sup>

The end of the MLB strike avoided the potentially problematic use of replacement players for the Toronto Blue Jays.<sup>96</sup> Aware of Ontario's prohibition on replacement workers, the Blue Jays approached the Ontario labour minister, who confirmed that Ontario labor law applied to the Blue Jays, despite NLRB jurisdiction over the MLB bargaining relationship.<sup>97</sup> The Blue Jays did not challenge Ontario's concurrent jurisdiction, but instead accepted that the Ontario law would prevent them from playing with replacement players at their home stadium or anywhere else in Ontario.<sup>98</sup> The Blue Jays therefore planned on using their spring training complex in Danedin, Florida as their home stadium, thereby allowing them to use replacement players for the 1995 season.<sup>99</sup>

Playing in Florida would allow the Blue Jays to escape the Ontario replacement worker prohibition and operate under U.S. labor law along with the rest of the league. Nevertheless, the decision to have the Blue Jays play several thousand miles from their fans could not have been made lightly.<sup>100</sup> The fact that the team planned to move instead of challenge the Ontario labour minister's decision to find jurisdiction supports the position that the minister had jurisdiction over the dispute. If so, the decision to move rather than not play is easier to justify. The Blue Jays, winners of the World Series in 1992 and 1993, were still the reigning world champions after the cancellation of the 1994 World Series.<sup>101</sup> The owners' planned season with replacement players would not have had much legitimacy—and thus,

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92. *Silverman*, 880 F.Supp at 261, *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

93. *Id.* at 252; Jordan Lippner, Note, *Replacement Players for the Toronto Blue Jays?: Striking the Appropriate Balance Between Replacement Worker Law in Ontario, Canada and the United States*, 18 FORDHAM INT'L L.J. 2026, 2045 (1995); *Baseball Owners Quit Fight; Opening Day is Set for April 26*, *supra* note 89.

94. *Baseball Owners Quit Fight; Opening Day is Set for April 26*, *supra* note 89; Lippner, *supra* note 93, at 2043.

95. *Baseball Owners Quit Fight; Opening Day is Set for April 26*, *supra* note 89.

96. Claire Smith, *Replacement Players? Never in Toronto*, N.Y. TIMES, Dec. 24, 1994, at A33.

97. *Id.* (quoting the Blue Jays' General Manager Gord Ash as saying, "The Labor Minister confirmed the law did apply to the ball club. She said she would uphold that law, no exceptions. So that made it very clear what the parameters are. And our lawyers' conclusion is that we cannot play baseball in Ontario, so we will not be party to the breaking of that law, nor do we expect that major league baseball would. Other than that, we don't have any answers at this point.").

98. *Id.*

99. Murray Chass, *Umpires Trying to Block Replacements in Toronto*, N.Y. TIMES, Apr. 22, 1995, at A36.

100. This is particularly true given that Baltimore Orioles owner Peter Angelos was refusing to field a team of replacement players in the Orioles' actual stadium. See Newhan, *supra* note 91.

101. *World Series History: Recaps and Results*, MLB.COM, [http://mlb.mlb.com/mlb/history/postseason/mlb\\_ws.jsp?feature=recaps\\_index](http://mlb.mlb.com/mlb/history/postseason/mlb_ws.jsp?feature=recaps_index) (last visited Oct. 6, 2013).

they would have had much less bargaining force—if the reigning champions did not participate in the league. While the MLB maintained its willingness to play the 1995 season with replacement players, it could not have been excited about that championship team playing in Florida. The federal injunction hurt the owners' bargaining position, but the jurisdiction of the OLRB and Ontario's prohibition on replacement players certainly helped to end the labor dispute before the 1995 season.

### B. THE 1995 UMPIRE LOCKOUT

During the same time that Major League Baseball and the Players' Association were battling over the players' strike, the MLB was engaged in a parallel dispute with the MLB Umpires Association. In January 1995, prior to the resolution of the players' strike, MLB locked out the sixty-four members of the umpires union, intending to use replacement umpires until the sides reached a new deal.<sup>102</sup> Once the player strike ended, however, the Blue Jays no longer needed to move their games to Florida. The league used replacement umpires for all spring training games and for the start of the season.<sup>103</sup> Thus, when the MLB opened the season on April 25, 1995, it was using replacement umpires in Toronto to perform the job functions of the locked out umpires.<sup>104</sup>

The same Ontario law that prohibited the Blue Jays' use of replacement players applied with equal force to the use of replacement umpires during a lockout.<sup>105</sup> Following the start of the season, the umpires union filed an unfair labor practice complaint against the MLB with the Ontario Labour Relations Board.<sup>106</sup> The MLB responded by trying to distinguish the umpires from the players in two ways.<sup>107</sup> First, the MLB argued that the lockout was an American activity, with insufficient commercial consequences in Ontario to give the OLRB jurisdiction.<sup>108</sup> The umpires were employed by the league, an association headquartered in New York, while the players were employed by the Blue Jays organization located in Ontario.<sup>109</sup> Second, the MLB argued that even if the OLRB had jurisdiction and

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102. Murray Chass, *Players Take Field, But Umpires Walk the Picket Lines*, N.Y. TIMES, April 15, 1995, at A1.

103. Murray Chass, *Replacement Umpires Called Out in Toronto*, N.Y. TIMES, Apr. 29, 1995, at A33.

104. See *Players Take Field, But Umpires Walk the Picket Lines*, *supra* note 102.

105. Ontario Labour Relations Act, § 73.1 (1990); *Ass'n of Major League Umpires v. Am. League*, 1995 CanLII 10058, para. 13.9 (Can. Ont. L.R.B.).

106. *Major League Umpires*, 1995 CanLII 10058.

107. *Id.* at para. 9. The MLB actually gave a number of other defenses; however, they were all dismissed without discussion. They were: (1) that the "reasonable apprehension of bias" (stemming from a newspaper report) prevented the OLRB from hearing the application, (2) that federal Canadian labor law applied rather than the Ontario Provincial Code, (3) that the "Umpires' Organization" is not a trade union under Ontario Law, (4) that the American CBA between the umpires and MLB is not a collective agreement in Ontario, (5) that there is no lockout in Ontario and (6) that the replacement worker language of the Code is inapplicable. *Id.* at para. 8, 9, 13.

108. *Id.* at para. 9.

109. See Murray Chass, *Umpires Hope a Law Might Be on Their Side*, N.Y. TIMES, Apr. 24, 1995,

even if a breach of Ontario labor law occurred, no remedy should be available.<sup>110</sup> Activities in Ontario were only a small part of the lockout and the lockout was legal under American labor law, where most of the lockout activities took place.<sup>111</sup> In other words, the MLB argued that the effect of using replacement umpires on Ontario labor policy was relatively small compared to the use of replacement players. According to that argument, holding Blue Jays home games in Ontario would have required the other teams' replacement players to perform work in Ontario, while only a few replacement umpires would be required to officiate the games in Toronto.<sup>112</sup>

The OLRB dismissed the MLB's first argument relatively quickly, finding that it had jurisdiction over the dispute under Ontario provincial labor law.<sup>113</sup> Umpires who "regularly and customarily" worked in Ontario were employees to whom the labor code applied.<sup>114</sup> Thus, the Board found jurisdiction over the lockout by focusing on the location of work stoppage, rather than the location of the employer.<sup>115</sup> The Board then held both that the use of replacement umpires was illegal and that the lockout was illegal under Ontario law because the MLB failed to observe Ontario's mandatory conciliation process before either side instituted a work stoppage.<sup>116</sup> Following the Board's logic, any umpire strike at that time would also have been illegal, and potentially so too was the baseball players' strike that had just recently ended.<sup>117</sup>

The Board found more problematic the question of whether it should issue an

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at C3; Complaint at 4, *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2 551 (D.N.J. 2013) (No. 13-1714), available at [http://fs.ncaa.org/Docs/public/NJComplaint\\_001-c.pdf](http://fs.ncaa.org/Docs/public/NJComplaint_001-c.pdf).

110. *Major League Umpires*, 1995 CanLII 10058, paras. 14, 15.

111. *Id.*

112. It is not clear what motivated the MLB to challenge the jurisdiction of the OLRB in a dispute with the small, sixty-four umpire bargaining unit. Given that the Blue Jays planned to move to Florida rather than challenge OLRB jurisdiction, the umpire dispute seems impractical. After all, the revenue of one Blue Jays game was more than enough to pay the difference between the umpires' and league's positions for all four years of the umpire agreement. *Umpires Hope a Law Might Be on Their Side*, *supra* note 109..

113. *Major League Umpires*, 1995 CanLII 10058, para. 13.2.

114. *Id.* at para. 13.4.

115. *Id.* at para. 13.6.

116. *Id.* at para. 13.8, 13.9. The Board's reference to "mandatory conciliation" refers to Section 74.2 of the 1995 Act:

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

(a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 115 (3) to have released to the parties the report of a conciliation board or mediator; or

(b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 115 (3) to have released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board.

Ontario Labour Relations Act, 21 R.S.O. § 74.2 (1990); *Nat'l Basketball Referees Ass'n v. Nat'l Basketball Ass'n*, 1995 CanLII 10011, para. 3 (Can. Ont. L.R.B.).

117. *Major League Umpires*, 1995 CanLII 10058, para. 13.8.

Ontario remedy for a lockout operated primarily, and lawfully, in the U.S.<sup>118</sup> It voiced a concern that the umpires' case could be an "opportunistic attempt to gain a tactical advantage from local collective bargaining law, that no one has sought to apply in the past."<sup>119</sup> The Board then considered problems of bargaining unit fragmentation and comity before concluding:

In any event, we do not think that we should decline to apply Ontario law simply because it is novel to do so, or because there may be collective bargaining consequences, or because one side may reap a temporary tactical advantage—any more than we would be inclined to exempt a local branch plant from the application of Ontario law where the same arguments might be made. It may be that the inability to strike, lock-out, or use replacement umpires in Ontario at this time has an effect on the ongoing collective bargaining, or introduces a new "wrinkle" into the collective bargaining process. However, we see no obvious reason why this should be an impediment to settlement, nor should it create an obstacle that cannot be overcome by bargaining in good faith—an obligation that the parties have in all jurisdictions. Certainly it is no reason not to apply the law at all.<sup>120</sup>

Essentially, the Board found the potential for a shift in the bargaining relationship insufficient to warrant a discretionary exception to Ontario law. But the Board did delay the effective date of the decision for six days, with the intention of placing pressure on the two sides to find a deal before disrupting Blue Jays games.<sup>121</sup> By broadly finding the lockout and any potential umpire strike illegal—rather than just the use of replacement umpires—the Board effectively prohibited the cancellation of games or any other escalating bargaining techniques. The Board cautioned both sides to conduct business as usual until they fully complied with the provisions of the Ontario code.<sup>122</sup>

On May 1, 1995, just four days after the OLRB decision, the MLB and umpires association reached a new five-year deal.<sup>123</sup> Under the deal, the umpires received substantial pay and bonus increases, as well as payment for a full 162 game season in 1995, despite the players' strike having shortened the season to 144 games, and the MLB's use of replacement umpires for the start of that shortened schedule.<sup>124</sup> Umpire attorney Richie Philips said that the OLRB decision, in addition to a number of on-field problems with replacement umpires, motivated the MLB to reach an agreement with the umpires.<sup>125</sup>

118. *Id.* at para. 14. Section 95 of the 1995 Labour Relations Act gives the Board discretion not to issue a remedy after ruling a lockout unlawful. See *Nat'l Basketball Referees*, 1995 CanLII 10011, para. 20.

119. *Major League Umpires*, 1995 CanLII 10058, para. 15.

120. *Id.* at para. 17.

121. *Id.* at para. 18.

122. *Id.* at para. 20.

123. Murray Chass, *Umpires Will Return Tomorrow*, N.Y. TIMES (May 2, 1995), <http://www.nytimes.com/1995/05/02/sports/baseball-umpires-will-return-tomorrow.html>.

124. *Id.*

125. *Id.* (quoting Philips as saying, "I don't want to say the Toronto decision itself triggered the agreement or the performance of the scabs triggered it. But I'd have to say those two factors were substantially contributory to the fact that the pace accelerated and we were able to get a deal.").



The MLB certainly could have invited the umpires back to work without a new contract in place, and the OLRB decision would have prohibited the umpires from striking in response.<sup>126</sup> But that solution would have created a problem with the rest of the league. Prior to the OLRB hearing, Philips held the position that the MLB could not end the lockout selectively by bringing back only enough regular umpires to work in Toronto while continuing to use replacement umpires in the United States.<sup>127</sup> If the league brought the umpires back for the whole league, U.S. labor law would not protect the MLB against umpire strikes in American cities in the way that the OLRB decision protected them in Ontario. With the threat of unannounced strikes in American parks disrupting games, the OLRB decision to intervene created sufficient pressure to encourage the sides to reach a new collective bargaining agreement.

### C. THE 1995 NBA REFEREE LOCKOUT

The OLRB faced the same jurisdictional dispute later in 1995, this time between the NBA and the National Basketball Referees Association.<sup>128</sup> The NBA locked out its referees prior to the start of the 1995–96 NBA season, using replacement referees for exhibition and regular season games, including home games for the Toronto Raptors.<sup>129</sup> This case, however, added a wrinkle to the reasoning of the umpire decision because the 1995–96 season was the Raptors' first in the NBA.<sup>130</sup> OLRB jurisdiction over the NBA's referees labor dispute was thus even more attenuated, as the referees did not have the same history of regular and customary employment in Ontario as the MLB umpires.

Nevertheless, the OLRB found jurisdiction over the dispute, held the lockout to be illegal and issued a remedy to end it.<sup>131</sup> The Board declined to decide whether an employment relationship sufficient to support jurisdiction in Ontario would have to be a "regular" working relationship.<sup>132</sup> Rather, the Board held that if there were such a requirement, it was satisfied by the NBA holding exhibition games in Toronto in the years leading up to the beginning of the Raptors franchise.<sup>133</sup> The

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126. *Major League Umpires*, 1995 CanLII 10058, para. 13.8.

127. *Umpires Hope a Law Might Be on Their Side*, *supra* note 109 (quoting Philips as saying, "They can't end a lockout for 4 members of a 64-member unit, then at the end of the Toronto series lock out everyone again.").

128. *Nat'l Basketball Referees*, 1995 CanLII 10011 (Can. Ont. L.R.B.).

129. Clifton Brown, *N.B.A. Referees Accept Contract*, N.Y. TIMES (Dec 5, 1995), <http://www.nytimes.com/1995/12/05/sports/basketball-nba-referees-accept-contract.html>; Mark Heisler, *Substitute Referees Get the Ax in Toronto*, L.A. TIMES (Dec 5, 1995), [http://articles.latimes.com/1995-11-11/sports/sp-2004\\_1\\_raptor-home-games](http://articles.latimes.com/1995-11-11/sports/sp-2004_1_raptor-home-games).

130. *Expansion Teams*, NBA.COM (Oct. 22, 2001, 7:01 PM), <http://www.nba.com/analysis/00422957.html>.

131. *Nat'l Basketball Referees*, 1995 CanLII 10011, paras. 19, 21.

132. *Id.* at para. 16.

133. *Id.* ("They may be infrequent, but since 1988, (other than in 1994 when many world championship basketball games were played and refereed by NBRA members) between one and four NBA exhibition games have been played in Ontario, in the month of October. This is indicative of a regular consistent pattern of activity.").

Board's decision did not inspire as quick of a resolution as it had with the MLB umpires, but it did lead to an end of the lockout in Toronto.<sup>134</sup> The referees refused to sign a no-strike agreement, so the NBA maintained the lockout in American arenas until nearly a month later, when the sides finally reached an agreement.<sup>135</sup>

Thus, in 1995, the OLRB had three disputes before them that closely resembled the 2012 NHL lockout dispute. Each case involved a sports league bargaining relationship governed by U.S. labor law, in each case a work stoppage affected employment in Canada, and in each case it found jurisdiction to end those stoppages. Of all the disputes, the 2012 NHLPA application before the Alberta Labour Board most closely resembles the OLRB's MLB players' strike, with its Canadian employer and a large number of replacement workers that would be required to maintain normal operations. In the MLB dispute, the Blue Jays and MLB didn't question the labour minister's statement of OLRB jurisdiction. In the two disputes that followed, the case for jurisdiction was weaker than the 2012 NHL dispute in Alberta. The umpires' lockout involved an American employer with a small number of employees operating in Ontario. The referees' lockout was similar to the umpires', but did not involve an established history of employment in Ontario. The result in both cases was the same, the OLRB exercised jurisdiction to end work stoppages occurring in Ontario. The import of this line of disputes is that the Alberta Labour Board's jurisdiction over the 2012-13 NHL lockout would have been consistent with established Canadian precedent.

#### D. THE OLRB REFUSES FURTHER EXTENSION OF JURISDICTION

The Ontario Labor Relations Board has not uniformly accepted jurisdiction over labor disputes involving sports bargaining relationships. Vincent Riendeau was an NHL player signed to a guaranteed contract for the 1994-95 and 1995-96 seasons with the Boston Bruins.<sup>136</sup> During the 1994-95 season, he played one game for the Bruins in Ontario.<sup>137</sup> Later in that season, the Boston Bruins assigned Riendeau to their minor league affiliate in Providence, Rhode Island.<sup>138</sup> After Boston refused to pay Riendeau's 1995-96 salary, he filed an unfair labor practice charge in Ontario, alleging that the NHLPA violated its duty of fair representation.<sup>139</sup>

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134. *Substitute Referees Get the Ax in Toronto*, *supra* note 129.

135. *N.B.A. Referees Accept Contract*, *supra* note 129; *Substitute Referees Get the Ax in Toronto*, *supra* note 129.

136. *Riendeau v. Nat'l Hockey League Players' Ass'n*, 2001 CanLII 4776 (Can. Ont. L.R.B.); *Vincent Riendeau Player Profile*, NHL.COM, <http://www.nhl.com/ice/player.htm?id=8450834#&navid=nhl-search> (last visited Sept. 29, 2013).

137. *Riendeau*, 2001 CanLII 4776 para. 3.

138. *Id.* Riendeau's guaranteed contract meant that Boston was required to pay him his NHL salary regardless of whether he played in the NHL for the Bruins or whether Boston assigned his playing rights to another team.

139. Boston claimed that Riendeau decided to retire and communicated that to the Providence team, thereby allowing Boston to cancel the remaining year on Riendeau's contract. *Id.* at paras. 1, 4. We might be suspicious of Boston's claim given that Riendeau played for six more seasons after Boston terminated his contract. *Vincent Riendeau Player Profile*, ELITEPROSPECTS.COM, <http://www.eliteprospects.com/player.php?player=53858> (last visited Sept. 29, 2013).

This time, the OLRB declined to exercise jurisdiction. Despite the fact that the NHLPA has its headquarters in Toronto, Ontario, the Board found that Riendeau's employment was in the United States. The case therefore failed to meet the "substantial connection" to Ontario necessary to warrant jurisdiction.<sup>140</sup> The Board distinguished the Umpire and Referee cases by noting that jurisdiction in both cases was based on activities taking place in Ontario.<sup>141</sup> By contrast, Riendeau's contractual dispute involved only American activities, leaving no nexus to Ontario on which jurisdiction could be based.<sup>142</sup>

The *Riendeau* decision underscores the persuasiveness of the three Ontario Labour Board cases from 1995. This Note argues that the Alberta Labour Board should have followed the precedent of the Ontario Board cases in making its 2012 NHL lockout decision. This argument would be weakened if the OLRB had always accepted jurisdiction, even if only in the sports context. But in *Riendeau* the OLRB did not accept jurisdiction when it reasonably could have. The NHLPA's headquarters were in Ontario and Riendeau did have limited employment there. At first glance, the *Riendeau* decision seems unusual given that, in the opposite situation, with a player on a Canadian team filing an unfair labor practice charge against the NHLPA in the United States, the NLRB would certainly accept jurisdiction.<sup>143</sup> The point is not that *Riendeau* might be wrongly decided—on the contrary, this different treatment can be explained by the history of NLRB administration of the bargaining relationship. The case is important because the Ontario Labour Board's refusal to accept Riendeau's colorable claim of jurisdiction suggests that the Umpire and Referee decisions were neither made frivolously, nor because they involved sports leagues. The Board's refusal to find jurisdiction therefore strengthens the analogy between the Ontario cases of 1995 and the 2012 NHL lockout.

### E. THE 2004-05 NHL LOCKOUT

In addition to the Ontario cases, the other substantial precedent available to the Alberta Board involves the 2004–05 NHL lockout. Following the cancellation of the 2004–05 season, but before the signing of the 2005–11 collective bargaining agreement, the NHLPA was concerned that the NHL would attempt to use replacement players to start the 2005–06 season. The use of replacement workers is allowed in certain situations under the NLRA,<sup>144</sup> so the NHLPA looked to Quebec and British Columbia, both of which prohibited the use of replacement

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140. *Riendeau*, 2001 CanLII 4776, paras. 5, 7, 8.

141. *Id.* at para. 10.

142. *Id.* at para. 11.

143. See generally Motion to Dismiss at Appendix A, *Edmonton Oilers*, 2012 CanLII 58944 (outlining the long history of NLRB administration over grievances of players on both American and Canadian teams).

144. 29 U.S.C. § 158(a); *Local 825, Int'l Union of Operating Engineers v. NLRB*, 829 F.2d 458 (3d Cir. 1987) (holding that an employer who lawfully locks out employees for the sole purpose of exerting economic pressure on employees, does not, without more, commit an unfair labor practice by hiring temporary replacement workers).

workers at that time.<sup>145</sup> The NHLPA applied to both provincial labor boards for the certification of NHL players as NHLPA local unions.<sup>146</sup> If successful, the local certifications would mean that the provinces' anti-replacements provisions would apply to those teams.<sup>147</sup>

The substance of these two applications is much different than the umpire and referee cases from 1995. Certification requires more than simple labor board jurisdiction over unfair labor practices; it also requires that the labor board find the bargaining unit to be "appropriate" to represent the interests of the workers.<sup>148</sup> Certification might have been necessary to deter *future* action by the NHL, because it was the only way the NHLPA could get a declaration from a provincial board that it would enforce local labor rules. But the "appropriate" inquiry made the NHLPA's argument for certification more complicated than the one the MLB umpires faced once replacement umpires were *already* working in Ontario.

The NHLPA must have doubted the possibility of certifying the entire NHLPA in Canada, with most of the players playing in the U.S., particularly given the existing bargaining relationship in the U.S. But certification of a single team as a local union might very well have deterred the NHL from using replacement players for the entire league.

The first of the NHLPA's applications involved the players on the Montreal Canadiens (NHLPA-Q) applying to be certified in Quebec by the Commission des Relations du Travail (CRT).<sup>149</sup> At the certification hearing, the NHL stressed that a forty-year bargaining relationship incorporating the players already existed in the U.S. In the NHL's view, a single-team bargaining unit would be inappropriate in the sports context because bargaining was necessary for the operation of the league.<sup>150</sup> The CRT agreed, finding the certification of a single team bargaining unit to be inappropriate.<sup>151</sup> The CRT refused to exercise further jurisdiction over the NHL-NHLPA lockout, citing the experience and ongoing oversight of the NLRB, with a finding of *forum non conveniens*.<sup>152</sup> The CRT did leave open the

145. See British Columbia Labour Relations Code, 244 R.S.B.C. §68 (2008); Quebec Code du Travail, 64 S.Q. § 109.1 (2012); Fournier & Roux, *supra* note 22.

146. E.g., the NHLPA-BC chapter, consisting solely of the players on the Vancouver Canucks, applied for certification as a distinct bargaining unit under British Columbia law.

147. Dave Stubbs, *Players' Union Looks at Labour Laws to Block NHL Lockout*, VANHOCKEY.COM (Sept 9, 2012), <http://www.vanhockey.com/2012/09/09/players-union-looks-at-labour-laws-to-block-nhl-lockout>.

148. BC Code §22 (1) ("When a trade union applies for certification as the bargaining agent for a unit, the board must determine if the unit is appropriate for collective bargaining . . .").

149. *Ass'n des Joueurs de la Ligue Nat'l. de Hockey v. Club de Hockey Canadien, Inc.*, 2005 QCCRT 354 (Can. Que. CRT).

150. For example, the number of league games is an issue for negotiation, but the NHL could not negotiate different numbers of games with different groups of players. See, e.g., *Am. Needle, Inc. v. NFL*, 130 S.Ct. 2201 (2010).

151. Fournier & Roux, *supra* note 22, at 155.

152. *Id.* *Forum non conveniens* is defined as

"the doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly

possibility of reexamining the application in the future, in case the two sides failed to resolve the work stoppage under the oversight of the NLRB. Shortly thereafter, the NHL-NHLPA reached a new CBA and the NHLPA dropped its request for certification in Quebec.<sup>153</sup>

The companion application in British Columbia did not resolve itself so quickly. The NHLPA-BC applied for certification as the exclusive bargaining representative of the Vancouver Canucks players before the British Columbia Labour Relations Board (BCLRB). The application was opposed by the NHL and the Canucks ownership group (Orca Bay). The first opinion ("*Orca I*") responded to the NHL's motion to adjourn the proceeding pending the resolution of its pending complaint before the NLRB alleging "that the NHLPA's application in [British Columbia] is illegal."<sup>154</sup> The NHL conceded at oral arguments, however, that the U.S. National Labor Relations Board had no authority to issue an order against the BCLRB or Orca Bay; it further conceded that there was no definite timeline for an NLRB investigation.<sup>155</sup> The NHL also withdrew its motion challenging the British Columbia Board's jurisdiction to hear the certification application.<sup>156</sup>

The NHL made three main arguments for the adjournment of the British Columbia certification hearing pending action from the NLRB: (1) proceeding with the application would show a disregard for U.S. law; (2) the BCLRB should grant the adjournment for policy reasons, because the application would interfere with the existing multi-employer bargaining relationship; and (3) the NLRB is the proper forum to adjudicate the withdrawal of certain players from the existing bargaining unit. Invoking the principles of *forum non conveniens*, the NHL argued that the BCLRB should avoid multiple hearings and delay proceedings until the NLRB had ruled on these issues.<sup>157</sup>

The BCLRB rejected each of the NHL's arguments for adjournment and set the matter for a decision on the merits, irrespective of the actions of the NLRB. First, the Board pointed out that the NLRB had no jurisdiction over the parties to the application and that the parties to the NLRB charge were entirely distinct from the parties to the BCLRB's application.<sup>158</sup> Second, the Board found that a hearing on

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brought in the first place."

BLACK'S LAW DICTIONARY 726 (9th ed. 2009).

153. Fournier & Roux, *supra* note 22, at 155.

154. Orca Bay Hockey Ltd. v. BC-NHLPA, 2005 CanLII 16029, paras. 4, 9 (Can. BC L.R.B.) ("The NHL's unfair labour practice complaint to the NLRB alleges that the BC-NHLPA's certification application amounts to a violation by the NHLPA of American labor law because it constitutes a refusal to bargain in good faith.").

155. *Id.* at para. 10-13.

156. Indeed, as is highlighted later in the opinion, the application is by a BC labor union to represent workers of a BC employer, under BC labor law, for work to be performed primarily in BC. *Id.* at para. 10, 16.

157. *Id.* at para. 14, 23.

158. *Id.* at para. 21. The parties before the NLRB were the NHL and the NHLPA. The parties before the BCLRB were Orca Bay and the NHLPA-BC. While the NHL actually brought the motion for adjournment, the BCLRB makes clear that they are merely an interested party, but not a party to the certification application. *Id.* at para. 3-4.

the merits would not interfere with the bargaining relationship. The Board recognized that *granting* the application might affect the NHL-NHLPA bargaining relationship, but that this was really an argument on the merits of the application.<sup>159</sup> Third, the Board rejected the applicability of *forum non conveniens*, noting that both the parties and the cause of action in the NLRB were different than those before the BCLRB.<sup>160</sup> The argument to avoid multiple hearings cut both ways: if Orca Bay were to win on the merits, the NLRB complaint would become moot.<sup>161</sup> The Board found adjournment unacceptable because the indeterminate schedule of the NLRB proceeding, possibly extending past the scheduled start of the next hockey season, would not necessarily resolve the dispute.<sup>162</sup>

For the purpose of this Note, *Orca 1* was the most important of the British Columbia decisions. It settled that the British Columbia Labour Board did have jurisdiction over British Columbia employees and British Columbia employers, regardless of any preexisting U.S. bargaining relationship. After conceding BCLRB jurisdiction during oral argument, the NHL's adjournment arguments sought to convince the BCLRB to decline jurisdiction over an entirely British Columbian employment relationship. The BCLRB's response illuminated some real problems with this type of argument. Regardless of what the NLRB did, it had no power to certify a bargaining unit in Canada, so multiple hearings might be necessary anyway. The NLRB had no power to prevent a Canadian trade union from making an application to certify Canadian workers in Canada. Whether the NLRB could sanction that union afterward in the United States was a separate issue. Besides, with many NHL players being Canadian citizens, they certainly could not have been prevented from pursuing certification on their own.<sup>163</sup> In the end, it simply made more sense for the BCLRB to reach an opinion on the merits before involving the NLRB.

Following *Orca 1*, the British Columbia Labour Board reached two decisions on the merits, first certifying the NHLPA-BC as a local union ("*Orca 2*"), then on rehearing, reversing and denying the certification ("*Orca 3*"). The arguments in these two hearings were largely a pretext for the more practical issue: would British Columbia labor law be a substantive obstacle to future NHL lockouts?<sup>164</sup>

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159. *Id.* at para. 22.

160. *Id.* at para. 27.

161. *Id.* at para. 24 (While the NHLPA would no longer be applying to certify its players in BC, the NHL might continue to pursue the unfair labor practice charge).

162. *Id.* at para. 24-25. The NHL argued that the NLRB has performed an expedited injunction investigation in the past with the MLB, though gave no specifics on such plans for the present case. See discussion *supra* Part II.A; Silverman v. Major League Baseball Players Relations Comm., Inc., 880 F.Supp 246, 250 (S.D.N.Y. 1995).

163. The argument that the players could not pursue a certification application in Canada without the NHLPA would have to be related to waiver, based on the players' ongoing contact with the NLRB through the NHLPA. However, I think that is an unsatisfying argument because NHLPA membership is required in order to play in the NHL. See Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, at 12 (July 22, 2005), available at <http://www.nhl.com/cba/2005-CBA.pdf>.

164. By the time these cases were decided, the 2004-05 lockout was long over. The NHLPA continued to pursue the certification because it would mean that jurisdiction in future work stoppages

The NHL's two arguments did not focus on day-to-day issues in British Columbia, but more broadly on the league's collective bargaining structure. It argued, (1) that the NHLPA-BC is not a "trade union" because it does not intend to negotiate a separate collective bargaining agreement from the NHLPA, and (2) that the NHLPA-BC is an inappropriate bargaining unit because any CBA must be negotiated league-wide.<sup>165</sup> Some discussion of these arguments is warranted because the 2012 Alberta Board decision cites at length from *Orca 3*.

In *Orca 2*, the BCLRB granted the NHLPA-BC certification, based specifically on the reasoning from the Ontario Umpire case.<sup>166</sup> The Board reasoned that while the NHLPA-BC was a relatively small portion of the overarching NHL-NHLPA bargaining structure, the Canucks players' connection to British Columbia was much stronger than was the umpires' connection to Ontario in the MLB umpire dispute.<sup>167</sup> This warranted extending the umpire decision's reasoning beyond its illegal lockout finding to allow certification of the NHLPA-BC.<sup>168</sup>

On application for rehearing in *Orca 3*, the BCLRB reversed its decision and denied the NHLPA-BC's certification.<sup>169</sup> This time, the Board focused on preserving the existing league-wide bargaining structure.<sup>170</sup> However, the Board stated repeatedly that BCLRB jurisdiction over the matter was conceded by both parties; the Board even went so far as to state that if the bargaining relationship became inoperable, the Board would reconsider certification.<sup>171</sup>

With multiple opinions and a reversal, the result of the NHLPA's 2005 certification applications was not as definitive as that of the 1995 Ontario disputes. The take-away from the extended litigation in British Columbia was that reasonable minds could disagree about whether the NHLPA-BC was an appropriate bargaining unit for the Canucks players. However, the British Columbia Board was clear that

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would be assured and remedial action prompt. The NHLPA clearly never intended to remove these players from the NHLPA bargaining unit, merely intending to certify them as a local division in Canada to act as a deterrent to future work stoppages.

165. *Orca 1*, 2005 CanLII 16029, para. 29.

166. Adell, *supra* note 13, at 1038; *Orca 2*, 2006 CanLII 21166, paras. 170-72 (Can. BC L.R.B.).

167. *Orca 2*, 2006 CanLII 21166, para. 170.

168. *Id.* at para. 172.

169. *Orca 3*, 2007 CanLII 31404, para. 78 (Can. BC L.R.B.).

170. *Id.* at 67-68 ("The nature of that structure can be summarized as an interdependent joint enterprise with a common set of rules. . . . Within that context, the longstanding ability of the NHL and the NHLPA to self-govern their relations through the CBA and agree upon forums and means to resolve their disputes is significant. We believe that in light of the nature of the structure, functioning and history of the existing regime, we should be reluctant to interfere with it by establishing another regime which is by definition, *prima facie*, a fragmenting and potentially competing, inconsistent structure.").

171. This is a point that I believe the ALRB misunderstands in its analysis of *Orca 3*. It will be discussed further *infra* Part III. See also *id.* at para. 29 ("The Applicants do not take issue, in their application for leave and reconsideration, with the Board's jurisdiction to grant the application for certification: they take issue with whether the Board should have exercised its discretion within that jurisdiction to grant the application."); *id.* at para. 77 ("All three elements—the employer Orca Bay, the union BC-NHLPA, and the employee Canuck players—are well served by their current league-wide bargaining structure. This is a crucial factor in our finding that the applied for bargaining unit is inappropriate. If this circumstance were to change, such that either or both parties were no longer well served by the existing bargaining structure, it may be that we would have to revisit our decision.").

it had jurisdiction to hear disputes between employees and employers located within British Columbia and that it might revisit the bargaining unit question in the future.

### III. THE 2012-13 NHL LOCKOUT

As the NHL prepared to lockout the players in 2012, the application of Canadian labor law remained unresolved between the parties. The NHLPA had failed to certify a local union in either Quebec or British Columbia during the prior lockout. It was not clear, however, whether provincial boards would have a different reaction to an illegal lockout actually in effect. Prior to the 2004–05 lockout, the NHL made mandatory applications for mediation or conciliation services preceding the lockout according to the labor codes of British Columbia, Alberta and Ontario. In preparation for the 2012–13 lockout, the NHL took similar precautions, despite maintaining throughout that provincial law did not apply to the bargaining relationship. Although the NHLPA had chosen to ignore these steps in 2004–05—only turning to provincial law once the season was lost and the NHL was threatening to use replacement players—the NHLPA was proactive in challenging the 2012–13 lockout in Canada. The NHL, on the other hand, referred to proceedings in Canada as a “joke” and a distraction from reaching a new CBA.<sup>172</sup>

#### A. 2012 NHLPA LEGAL ACTION IN ONTARIO AND QUEBEC

In Ontario, the Act banning replacement workers that played such a large role in the baseball strike and umpire lockout of 1995 had been repealed.<sup>173</sup> The mandatory conciliation process that made the lockouts in both of those cases illegal was also repealed and was replaced by a conciliation process either party could request.<sup>174</sup> In the time leading up to the 2012–13 lockout, the NHLPA invoked this provision and made a request to the Ontario Labour Relations Board to begin the conciliation process. The NHL opposed the request, characterizing it as a “pretext” to create a technical barrier to an NHL lockout.<sup>175</sup> The Ontario Ministry of Labour sided with the NHL, denying the NHLPA request and deferring to the mediation services offered by the NLRB.<sup>176</sup> The refusal to form a conciliation Board formally removed any legal obstacle to an NHL lockout in Ontario.<sup>177</sup>

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172. Scott Burnside, *Will Different Dynamics Save Season?*, ESPN.COM (Sept. 12, 2012), [http://espn.go.com/nhl/story/\\_/id/8369671/comes-nhl-nhlpa-cba-negotiations-time-teams-dynamics-different](http://espn.go.com/nhl/story/_/id/8369671/comes-nhl-nhlpa-cba-negotiations-time-teams-dynamics-different).

173. Ontario Labour Relations Act, S.O. 1995, ch. 1, sched. A. § 43.15 (2009), available at [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_95101\\_e.htm#BK22](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_95101_e.htm#BK22).

174. *Id.* at § 18.

175. Rick Westhead, *Ontario Government Rejects NHL Players' Plea for Help in Talks*, THESTAR.COM (Sept. 7, 2012), <http://www.thestar.com/sports/hockey/nhl/article/1252597—nhl-labour-ontario-government-rejects-nhl-players-plea-for-help-in-talks>.

176. *Id.*

177. As opposed to the resolution in Alberta, where the Board refused to issue a remedy despite the lockout's illegality under the law, the action of the Labour Minister made the lockout lawful in Ontario. *See id.*



In Quebec, the NHLPA objected to the lockout because the Quebec Labour Code does not allow lockouts against employees who are not members of a CRT certified trade union.<sup>178</sup> In effect, this was the opposite of its 2005 strategy to block the use of replacement players by becoming a CRT certified trade union. The argument is fairly straightforward, as the Quebec Code only allows lockouts as a bargaining tactic where the employees have the right to strike the employer, and employees must be certified to legally strike.<sup>179</sup> Invoking those provisions, the NHLPA petitioned the Commission des Relations du Travail for an injunction and a permanent order preventing any future lockout in Quebec.<sup>180</sup>

Although the NHLPA's argument correctly applied Quebec law, the Board noted that the law assumed that Quebec certification would be a prerequisite for any labor dispute. Because the existence of another labor system disrupted that assumption, the Board found that the legality of the lockout was unclear and would require a full hearing on the merits.<sup>181</sup> The Board denied the temporary injunction because the players could not show that they would suffer irreparable harm from the lockout.<sup>182</sup> The potential damages to the players consisted only of their wage payments that were withheld during the lockout, a harm that could be fully remedied in the future.<sup>183</sup> However, the Board did set a date for a hearing on the merits, maintaining pressure on the NHL to reach a new agreement.<sup>184</sup>

## B. ILLEGAL LOCKOUT APPLICATION IN ALBERTA

In Alberta, the NHLPA filed an illegal lockout complaint in front of the Alberta Labour Relations Board (ALRB) against the Edmonton Oilers and the Calgary Flames alleging that they failed to follow the procedural steps required for a lawful lockout in Alberta. Since the teams themselves employ the players, they are required to comply with the Alberta Labour Code's provisions governing employee lockouts: specifically, the Code required mediation, a statutory cooling off period and an Alberta Board-supervised lockout vote.<sup>185</sup> The NHLPA alleged that the required mediation never took place, meaning that the cooling off period could not have started, and that no Board-supervised lockout vote ever occurred.<sup>186</sup>

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178. *Armstrong v. Club de Hockey Canadien Inc.*, 2012 QCCRT 445 paras. 20-25 (Can. Que. CRT); Quebec Code du Travail, 64 S.Q. §§ 106, 109.1 (2012).

179. *Armstrong*, 2012 QCCRT 445, para. 234.

180. *Id.* at para. 4.

181. *Id.* at para. 42-43.

182. *Id.* at para. 45.

183. *Id.* Clearly the players would argue that not playing hockey is an added harm, but because this application would only stop the lockout for the Montreal Canadiens' players, its success alone could not bring back enough of the league to restart the season.

184. The merits were never decided in this case. As part of subsequent negotiations, the NHLPA agreed to adjourn the proceedings to help the ongoing negotiations, and subsequently the sides reached a new CBA, ending the lockout and mooted the application. See Jason Brough, *NHL, NHLPA Request Quebec Labour Board Adjournment*, NBCSPORTS.COM (Dec 5, 2012), <http://prohockeytalk.nbcsports.com/2012/12/05/nhl-nhlpa-request-quebec-labour-board-adjournment>.

185. Alberta Labour Relations Code, R.S.A. 2000, c. L-1 §§ 65, 74, 75.

186. Complaint at 7, *Edmonton Oilers*, 2012 CanLII 58944. The NHLPA also claimed that the

Just as it had in 1994 and in 2004–05, the NHL took steps to comply with Alberta law when implementing the 2012–13 lockout.<sup>187</sup> In late August 2012, the NHL accepted ALRB jurisdiction over the lockout in Alberta,<sup>188</sup> and a week later the NHL submitted the required application for a Board-supervised lockout vote.<sup>189</sup> The NHLPA opposed the NHL's vote application, suggesting that the ALRB might not have jurisdiction to oversee a lockout vote.<sup>190</sup> Seizing on this, the NHL reversed its position and denied that the ALRB had jurisdiction over the NHL-NHLPA bargaining relationship. Following discussion between the two parties, the NHLPA supplied a letter agreeing not to assert—for the purpose of the lockout vote application—that the ALRB had jurisdiction over the bargaining relationship.<sup>191</sup>

The NHL believed that it had settled all legal action in Alberta.<sup>192</sup> It dropped

NHL failed to timely serve notice to bargain according to the Code, but that claim was dismissed in a prior writing by the Board. *Id.* at 6.

187. *Edmonton Oilers*, 2012 CanLII 58944, para. 19 (“In each of the previous lockouts, the NHL or its member Alberta clubs followed certain of the collective bargaining provisions within the *Code* relating to notices, mediation and other preconditions to lockout.”).

188. Complaint at 6, *Edmonton Oilers*, 2012 CanLII 58944. In preparation to meet these preconditions, the NHL made an application to the ALRB to appoint a mediator; though, the NHL qualified this request with “it will be our position that no meetings are necessary in Alberta.” *Id.* The NHLPA objected to the appointment of a mediator because the NHL failed to serve timely notice to bargain, as required by the Code, and the NHL was simply applying as a precondition of lockout. However, the Director disagreed with the NHLPA objections. *Edmonton Oilers*, 2012 CanLII 58944, para. 21. Accordingly, a mediator was appointed, but the mediator recused himself three days later, having decided that a deal was impossible. *Id.* at para. 22 (the mediator's letter is quoted, “[a] recommendation that would be acceptable to both parties is not possible at this time”).

189. The NHLPA objected to the vote application on the basis that the NHL had not sufficiently participated in mediation, thus the required cooling period had not been satisfied. The NHLPA also continued to advance the objections previously denied by the Director regarding the appointment of a mediator. See Complaint at 7, *Edmonton Oilers*, 2012 CanLII 58944.

190. *Edmonton Oilers*, 2012 CanLII 58944, para. 23. The NHLPA was arguing that the ALRB could not have jurisdiction to supervise the vote because it did not have jurisdiction over the bargaining relationship, but that the ALRB nevertheless had jurisdiction over the specific employers. Thus, without a certified union in Alberta, no lockout would be lawful. This is the opposite argument from the one made during the certification applications in 2005–07. See *id.* at paras. 23–25.

191. The NHLPA letter, reproduced in the opinion, very carefully reserves the rights of its members to challenge a lockout in Alberta under the Code:

We believe that the NHLPA's position is quite clear.

The NHLPA does not assert for purposes of this proceeding that it has voluntary recognition relationships to which the *Code* applies with the Edmonton Oilers or the Calgary Flames. Further, the NHLPA does not assert that it has a voluntary recognition relationship to which the *Code* applies with the NHL.

The NHL's position before the Board seems equally clear. As we understand it, the NHL position is that the *Code* does not apply to the current relationship between the NHL and the NHLPA. The NHLPA will not be contesting that in these proceedings.

Notwithstanding the foregoing, the NHLPA takes no position in this proceeding about the lawfulness of any post-September 15 lockout. *That issue is not currently before the Board. The NHLPA does not concede that the Code does not apply to the Alberta Teams, or that their employees have no rights under the Code.*

*Edmonton Oilers*, 2012 CanLII 58944, para. 25 (emphasis added).

192. *Id.*; see also Robert Tychowski, *Alberta Labour Board Reserves Decision on Oilers and Flames NHL Lockout Appeal*, EDMONTONSUN (Sept 21, 2012), <http://www.edmontonsun.com/2012/09/>

the ALRB lockout vote application, and on September 13, 2012, the NHL Board of Governors decided unanimously to lockout the NHL players in a vote supervised by the NLRB.<sup>193</sup> That same day, the NHLPA filed an illegal lockout charge in Alberta, on behalf of the players in Calgary and Edmonton, asserting that the NHL failed to meet the necessary preconditions to implement a lockout in Alberta.

The following day, the NHL filed a perfunctory motion to dismiss, relying exclusively on the position that the ALRB had no jurisdiction over the dispute.<sup>194</sup> The league cited a variety of evidence related to the past practices of the two parties: prior bargaining and legal history in the U.S., the NHLPA letter from the lockout vote dispute and the policy behind the *Orca 3* decision to promote collective bargaining structures.<sup>195</sup> The NHL failed to allege that it had complied, or even functionally complied, with the Code; it also failed to ask specifically for the ALRB to exercise jurisdiction not to intervene.<sup>196</sup> The NHL's reliance on a jurisdictional argument was striking, given that none of the four prior NHL-NHLPA Canadian lockout charges were decided on jurisdictional grounds.<sup>197</sup>

Moreover, the NHL's jurisdictional argument based generally on past practice is unpersuasive. Admittedly, the NHL and NHLPA have a long history of settling disputes under U.S. law.<sup>198</sup> The ALRB has also heard applications from NHL players in the past, however, and during both the 1994–95 and 2004–05 lockouts the NHL actively participated in the Alberta Code's lockout preconditions and procedures.<sup>199</sup> If anything, the past practice of the parties supported the position that the ALRB would have jurisdiction. The NHLPA's letter may have been intended to cause the NHL to cancel the Alberta lockout vote, but it plainly and very specifically reserved the rights of its players to challenge the lockout in Alberta. Finally, in *Orca 3*, the British Columbia Labour Relations Board found

21/alrb-reserves-decision-on-oilers-and-flames-appeal (quoting Bill Daly, “[W]e got to a point where I thought we had an understanding . . . that the Alberta Labour Code didn’t apply”).

193. *Edmonton Oilers*, 2012 CanLII 58944, paras. 28–29. See also Jeff Klein, *N.H.L. Talks Still Frozen as Words Heat Up*, N.Y. TIMES (Sept 13, 2012), [http://www.nytimes.com/2012/09/14/sports/hockey/nhl-board-supports-bettmans-promise-to-lock-out-players.html?\\_r=0](http://www.nytimes.com/2012/09/14/sports/hockey/nhl-board-supports-bettmans-promise-to-lock-out-players.html?_r=0) (“[T]he N.H.L. Board of Governors gave commissioner Gary Bettman a unanimous vote supporting his promise to call a lockout . . .”).

194. The NHL and NHLPA also had a full day of oral arguments, where ostensibly the NHL offered a more diverse series of arguments. See *Alberta Labour Board Reserves Decision on Oilers and Flames NHL Lockout Appeal*, *supra* note 192. The NHL's motion and a few newspaper quotes are the only sources available for their arguments, because the Alberta Board does not allow post-hearing briefs or transcripts of hearings.

195. See generally NHL's Motion to Dismiss, *Edmonton Oilers*, 2012 CanLII 58944.

196. The NHL made this last argument at oral arguments. See Charles Rusnell, *NHLPA Argues League Can't Lock Out Alberta*, CBC (Sept. 21, 2012), <http://www.cbc.ca/news/canada/edmonton/nhlpa-argues-league-can-t-lock-out-alberta-players-1.1159149>.

197. See discussion *supra* Part II.D and Part III.A.

198. NHL's Motion to Dismiss at Appendix A, *Edmonton Oilers*, 2012 CanLII 58944.

199. *Edmonton Oilers*, 2012 CanLII 58944, para. 8 (“[I]ndividual players have sought recourse from this Board including an application to find the NHLPA an employer dominated organization under Allan Eagleson . . . .”); *id.* at para. 19 (“[B]oth the Calgary Flames and Edmonton Oilers applied in 2004, and the NHL, on their behalf in 1994, for a lockout vote as required by the Code. At no time did the NHLPA object to this process nor was there disagreement between the parties over jurisdiction.”).

jurisdiction over the certification application and over future disputes. The NHL did not even challenge the BCLRB's jurisdiction in that case.<sup>200</sup> Thus, the NHL's brief before the Alberta Board relied on a colorable but underwhelming jurisdiction argument; the result of which would be to officially end further litigation in Alberta, and possibly in other provinces as well.

### C. THE EFFECT OF LABOR POLICY ON THE ALRB DECISION

On October 10, 2012, the Alberta Labour Relations Board denied the NHLPA's illegal lockout charge in its entirety. The ALRB noted that its jurisdiction over the dispute was in doubt given the NLRB's prior authority over the bargaining relationship. Without deciding jurisdiction, the ALRB declined to intervene on policy grounds. The Board cited, in particular, the ongoing bargaining relationship and the potential disturbance to negotiations that could result if the lockout were ruled illegal in Alberta. NHL Deputy Commissioner Bill Daly expressed his optimism that the "distraction" of these Canadian cases was over and that the NHLPA could refocus on negotiating an end to the lockout.<sup>201</sup> When the ALRB issued its decision, the NHL still had time to reach a settlement that would have saved a full 82-game season.<sup>202</sup> Nevertheless, it took the NHL and NHLPA an additional three months to reach a deal to end the lockout, which lost the NHL and its dependent businesses three months of revenue before the sides finally agreed to play a 48-game season.<sup>203</sup>

The ALRB's first point in its decision was that this case was *sui generis*. That is, the Board claimed that sports labor law is distinct from other labor negotiations and particularly that the NHL situation is unique in Alberta.<sup>204</sup> Yet, even assuming that sports bargaining is distinct in structure from other types of labor bargaining, the NHL application was certainly not unique. In fact, the Board heard an application for certification from the Canadian Hockey League Players' Association (CHLPA) the very same month it issued the NHLPA decision.<sup>205</sup> The CHLPA was a union formed to represent players in the Canadian Hockey League, a developmental league for aspiring NHL players. Despite the name, the CHL includes eight American teams.<sup>206</sup> Thus, the CHLPA application sought local

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200. It is equally surprising that neither the NHLPA's complaint nor its reply brief mentions the Umpire case from Ontario.

201. Sean Gentile, *NHL Lockout: Alberta Labor Board Dismisses NHLPA's Legal Maneuver*, SPORTINGNEWS (Oct 10, 2012), <http://aol.sportingnews.com/nhl/story/2012-10-10/nhl-lockout-news-albert-labor-board-ruling-cba-negotiations-nhlpa> (quoting Bill Daly from a league statement, "[w]e are hopeful that this ruling will enable both the League and NHL Players' Association to focus all of our efforts and energies on and our Players back on the ice").

202. *NHL Proposal to Save 82-Game Season*, NHL.COM (Oct 17, 2012), <http://www.nhl.com/ice/news.htm?id=643570>.

203. *NHL Season to Open Next Saturday*, ESPN.COM (Jan. 13, 2013), [http://espn.go.com/nhl/story/\\_/id/8838342/players-ratify-new-nhl-labor-deal-camps-set-begin-sunday](http://espn.go.com/nhl/story/_/id/8838342/players-ratify-new-nhl-labor-deal-camps-set-begin-sunday).

204. *Edmonton Oilers*, 2012 CanLII 58944, paras. 5, 6.

205. *In re Canadian Hockey League Players' Ass'n*, Local 99, 2012 CanLii 64182 (Can. Alta. L.R.B.).

206. The CHL is a collection of three "junior" leagues, the Western Hockey League

certification and protection under the Alberta Labour Code for a union covering hockey players working in the U.S., Alberta and other Canadian provinces. The CHLPA certification was denied because the association failed to wait the statutorily required sixty days before filing an application.<sup>207</sup> However, the CHLPA application presents another analogous case, arising in the same month, which directly refutes the ALRB's *sui generis* claim.

Further, the frequency of labor disputes and the participation of Canadian teams in North American sports leagues belie the Board's claim. The occurrence of North American sports leagues operating in Alberta, and other provinces, is more extensive than the Board acknowledges.<sup>208</sup> As the earlier discussion shows, Ontario faced three similar disputes in 1995, and the Alberta Board decided the fifth such challenge involving the NHL in the prior decade. Canadian teams, with Canadian employees, currently participate in the NHL, NBA, MLS and MLB, suggesting similar challenges will arise in future. Moreover, provincial labor jurisdiction over U.S.-administered bargaining relationships is not unique in the sports context. The 1995 MLB Umpire decision recognized that "the principles that emerge may have application beyond the particular situation under review."<sup>209</sup> This is a point also stressed in the NHLPA complaint: "[T]here is nothing novel or surprising about the proposition that undertakings that operate in multiple jurisdictions must, to the extent they operate in this Province, order their affairs to ensure that the [sic] abide by the law of the Province."<sup>210</sup>

After attempting to distinguish the NHLPA application from other contexts, the ALRB discussed jurisdiction. The Board found the application of Alberta labour law to the NHL-NHLPA bargaining relationship to be complex and chose not to decide the question because it could dismiss the case on other grounds:

The vacillating positions of the NHL and the NHLPA in this dispute underscore that the question of which jurisdiction's labour laws apply to this relationship is anything but "simple." In our opinion, that issue, which has been left ambiguous by the parties for almost 50 years, is not best answered in the heat of a strike or lockout. We have determined that for the purposes of this application, we do not have to resolve the jurisdictional question because, even if the Board has jurisdiction to declare the

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(<http://www.whl.ca>), the Ontario Hockey League (<http://www.ontariohockeyleague.com>), and the Quebec Major Junior Hockey League (<http://www.lhjmj.qc.ca>). As a whole, the CHL contains American teams in Erie, PA; Plymouth, MI; Saginaw, MI; Everett, WA; Portland, OR; Kent, WA; Spokane, WA; and Kennewick, WA. The CHL also includes four teams in Alberta cities: Calgary, Edmonton, Lethbridge, and Red Deer. OHL Team Directory, <http://www.ontariohockeyleague.com/page/ohl-team-directory>; WHL Club Directory, [http://www.whl.ca/page/whl-club-directory\\_92228](http://www.whl.ca/page/whl-club-directory_92228).

207. See *In re Canadian Hockey League Players' Ass'n*, Local 99, 2012 CanLII 64182 (Can. Alta. L.R.B.).

208. For example, the NBA has a history of hosting exhibition events in Alberta, just as it had before starting the Toronto Raptors in Ontario in 1995. See generally *International Timeline*, NBA.COM, [http://www.nba.com/history/International\\_Timeline.html](http://www.nba.com/history/International_Timeline.html) (last visited Sept. 15, 2013).

209. *Ass'n of Major League Umpires v. Am. League*, 1995 CanLII 10058, para. 1 (Can. Ont. L.R.B.).

210. Complaint at 9, *Nat'l Hockey League Players' Ass'n v. Edmonton Oilers Hockey Corp.*, 2012 CanLII 58944 (Can. Alta. L.R.B.). See, e.g., Brian P. Smeenk, *Five Essentials for Doing Business in Canada*, 7 NO. 10 DEL. EMP. L. LETTER 7 (2002).

lockout unlawful, it should not exercise its discretion to do so in these circumstances.<sup>211</sup>

The Board placed significant emphasis on the parties' history of collective bargaining without decisively answering the issue of Canadian provincial jurisdiction over the bargaining relationship. However, this view ignores a large aspect of that bargaining history. The Board neglected to mention that there had been four NHL work stoppages over the past twenty years, or the fact that the NHLPA had made five applications for provincial intervention in the past eight years.<sup>212</sup> Given the NHL's compliance with the Code in 2004–05, and intention to comply in 2012 before the jurisdictional dispute, it seems that Alberta jurisdiction over the relationship was the *only* actual question to be resolved between the parties. The Board's failure to answer this question means that potential provincial intervention is still an open question in the NHL-NHLPA bargaining relationship.

The Board's position on its own jurisdiction is perplexing. First, Canada is a sovereign nation, meaning the ALRB *could* exercise jurisdiction in this situation. In other words, the NLRA does not have any binding or preemptive effect on Canadian labor law. The Calgary Flames and Edmonton Oilers are Alberta businesses that conduct business, pay taxes, and employ unionized workers in the province. Simplified to this level, it must be within the Board's power to intervene in their relationships. Thus, the ALRB's failure to assert jurisdiction over lockout activities in Alberta must have been founded on practical concerns about interfering with the NHL-NHLPA bargaining relationship. A clear statement of ALRB jurisdiction would have been a more practical solution for striking a balance between Alberta labor policy and the ongoing bargaining relationship. To that end, Part IV will argue that the Board's reliance on *Orca 3* in giving deference to the NHL bargaining relationship was mistaken.

When the Alberta legislature passed the Alberta Labour Relations Code, it made a conscious decision to place preconditions on the ability of Alberta businesses to lock out their employees. The ALRB recognizes that locking out employees during negotiations is an "economic weapon."<sup>213</sup> The statutory preconditions exist as protection for workers against the use of that economic weapon by employers.<sup>214</sup> Exercising jurisdiction over the employment practices and economic weapons used by the Flames and Oilers is the only way to protect Canadian employees (and hockey consumers) from unfair labor practices in Alberta. Notice that whether labor policy or the Code counsel against actual intervention in this NHL lockout is a separate inquiry, and one not reached until after answering the threshold question of whether the ALRB has jurisdiction over the dispute. The ALRB's failure to answer the threshold jurisdictional question was unwise because jurisdiction is the issue with the broadest ongoing effect on the NHL-NHLPA bargaining

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211. *Edmonton Oilers*, 2012 CanLII 58944, para. 34.

212. See discussion *supra* Part II.D and Part III.A.

213. *Edmonton Oilers*, 2012 CanLII 58944, para. 41.

214. It might also signal a policy to discourage drastic negotiation tactics, like all work stoppages, for the good of employment relationships and society.

relationship.

The ALRB's most compelling justification for declining jurisdiction was judicial efficiency. The Board might have wanted to save the parties the expense and duplicative process of arguing before both the Board and the NLRB. Under this theory, the motive for the Board's indecisive action was to dissuade the NHLPA from bring future challenges in Alberta, while leaving the door open for future jurisdiction in the case of a particularly egregious unfair labor practice by the NHL. If this was in fact the motivation for the Board's decision, it was misguided for policy reasons.

First, the Alberta Code specifically supports a policy of clarity in labor obligations.<sup>215</sup> The Board noted that the parties had adopted "vacillating positions" on Alberta jurisdiction, with the NHL and the NHLPA accepting or denying Board jurisdiction when it suited their motives.<sup>216</sup> If the parties were unclear about jurisdiction, there was only one remaining entity capable of settling that question—the ALRB. This is precisely what the British Columbia Board did when questioning the NHL's no-jurisdiction claim at oral arguments in *Orca 1*, thereafter establishing jurisdiction in British Columbia.<sup>217</sup>

Moreover, the ALRB's decision fails to bring clarity to the labor relationship because it confuses the threshold jurisdictional issue with the merits of the illegal lockout application. If labor policy counseled discouraging the NHLPA from turning to Alberta for all but the most serious unfair labor practices, that policy should be reflected in the standard used for the merits of the application. The Board could have more effectively reached the same result by accepting jurisdiction and creating a presumption against intervention when the bargaining relationship is already administered by another labor board. In discussing its decision not to issue a remedy, the board stated: "[L]abour boards often consider the impact of their decisions from a policy and practicality perspective when determining an appropriate decision on an illegal strike or lockout application."<sup>218</sup> Instead, the Board created confusion, leaving the result of future Alberta applications by the NHLPA uncertain.

Second, the Board's ambiguous stance on jurisdiction creates bad incentives. If the Board decided that it should never intervene in sports bargaining relationships administered under the NLRA, then the Alberta Code would not actually provide any protections for the NHL players. Even if that is sound labor policy itself, is it sound policy to announce that fact to the Oilers, Flames and the NHL directly? At the very least, if the Board were to accept jurisdiction and decline to intervene at that time, as the British Columbia Board did in *Orca 3*, it would create the *appearance* of labor oversight. The possible threat of Alberta Board intervention

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215. See Preamble, Alberta Labour Relations Code R.S.A. 2000, c. L-1 (Can.) ("[E]mployees and employers are best able to manage their affairs where statutory rights and responsibilities are clearly established and understood.").

216. See generally *Edmonton Oilers*, 2012 CanLII 58944, paras. 20-30.

217. *Orca Bay Hockey Ltd. P'ship v. B.C. Chapter of the Nat'l Hockey League Players' Ass'n*, 2005 CanLII 16029, para. 10-13 (Can. BC L.R.B.).

218. *Edmonton Oilers*, 2012 CanLII 58944 at para. 37.

might put pressure on the sides to settle and encourage compliance with the legislature's policies.<sup>219</sup>

#### IV. THE ALRB'S FOUR REASONS FOR NOT EXERCISING JURISDICTION

The ALRB dismissed the NHLPA's application by exercising its discretion not to declare the lockout unlawful. The Board found this power of total policy discretion through a close reading of section 87 of the Alberta Labour Code. The Board quoted from section 87: "[T]he Board *may* . . . so declare and *may* direct what action, if any, [an employer] shall do or refrain from doing with respect to the unlawful lockout . . . ."<sup>220</sup> The Board glosses over this point, but a precondition of using the highlighted "may" to derive the Board's discretionary power is that the Board must first have found that the lockout was illegal under Alberta law. Under section 87, the Board exercised its discretion not to reach the merits, meaning that the NHLPA would get no remedy. That is very different from exercising discretion in evaluating the merits, which might have made the lockout lawful—a result that does not appear to be authorized by section 87. This fact at least confirms the NHLPA's reading of the Code. The Board could not have found that the lockout was lawful, because technically it was not; however, the Board could correctly find the lockout to be illegal, but exercise its discretion not to make an "illegal lockout" declaration or issue a remedy.

Parts of the Board's statutory analysis are noticeably vague. For instance, the Board neglected to state that the NHL lockout failed to meet the standard in the Code for a lawful lockout.<sup>221</sup> The ALRB would most likely have preferred to find a reading of the Code that made the lockout legal in Alberta, rather than simply not

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219. That type of pressure existed in *Orca 3*, despite the BCLRB decision not to intervene. "If this circumstance were to change, such that either or both parties were no longer well served by the existing bargaining structure, it may be that we would have to revisit our decision." *Orca Bay Hockey Limited P'ship v. Nat'l Hockey League*, 2007 CanLII 31404 (Can. BC L.R.B.).

220. *Edmonton Oilers*, 2012 CanLII 58944, para. 36 (emphasis in original). The provision in full is as follows:

Where the Board is satisfied that:

(a) an employer or employers' organization called or authorized or threatened to call or authorize an unlawful lockout, or

(b) an officer, official or agent of an employer or employers' organization counseled, procured, supported or encouraged an unlawful lockout or threatened an unlawful lockout,

the Board may, in addition to and without restricting any other powers under this Act, so declare and may direct what action, if any, a person, employee, employer, employers' organization or trade union and its officers, officials or agents shall do or refrain from doing with respect to the unlawful lockout or threat of an unlawful lockout.

Alberta Labour Relations Code, R.S.A. 2000, c. L-1 § 87 (Can.).

221. More than a full page after the discussion of section 87, the Board does say that "even if the technical requirements of the preconditions to lockout in the *Code* have not been fully met by the NHL in these circumstances, we are satisfied the NHLPA fully understood what was at play." But even this is phrased as a conditional. *Edmonton Oilers*, 2012 CanLII 58944, para. 41.



illegal.<sup>222</sup> Instead, the ALRB was forced to use strong language on the proper use of discretion in illegal lockout complaints.<sup>223</sup>

By contrast, the Board was much more specific with the four policy reasons for deciding not to exercise jurisdiction and intervene in the NHL lockout: (1) declaring the lockout illegal would have no practical impact on the stoppage as a whole, given that the lockout is conceded to be lawful under the National Labor Relations Act, so the declaration would have no impact on the 28 non-Albertan teams; (2) the Board did not want to encourage the NHLPA to take strategic and inconsistent opinions by granting its request for relief; (3) the Code's preconditions are intended to encourage "rational discussion and good faith bargaining" and the Board was satisfied that the players were adequately represented and protected by their union and the NLRB; and finally, (4) the intervention of the Board into the bargaining relationship "would be detrimental to the ongoing relationship between the parties and the ability of the league to function properly."<sup>224</sup>

These four policy considerations apply to multiple aspects of the opinion. Only the ALRB's second reason applies only to the specifics of this lockout and the multiple positions taken by the NHLPA leading up to it. The Board was clearly irritated about the NHLPA's letter encouraging the NHL to drop the lockout vote in order to allow the players to challenge the lockout before the Board. Importantly, the ALRB's other three considerations relate more generally to the structure of the NHL-NHLPA bargaining relationship and the Board's jurisdiction over only the players in Alberta. The force of these three considerations is not limited to the case at hand; they are reasons to not intervene in this type of situation generally. Thus, if the ALRB thinks these considerations make jurisdiction imprudent now, it is likely that the Board will *never* take jurisdiction. For this reason, these three considerations go directly to the question of whether the ALRB should exercise jurisdiction over the NHL-NHLPA bargaining relationship, and more importantly, of whether it should provide minimum labor protections for the players on the Flames and Oilers.

As an initial matter, the Board's four proffered considerations are not internally consistent. The first reason suggests that Board intervention would have no effect on the lockout. The fourth reason suggests that Board intervention would be detrimental to the basic functioning of the NHL—in other words, that intervention would have a dramatic effect on the lockout. While it remains to be seen whether either contention is true individually, it is clear that they cannot both be true.

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222. Such a reading might have existed if section 74 allowed a valid lockout vote with "a Labour Board of proper standing" or something to that effect. Such language might have allowed the Board to count the NHL's lockout vote before the NLRB as a satisfactory vote under the Code. Unfortunately, section 74 requires a valid lockout vote "held under this Division." Alberta Labour Relations Code, R.S.A. 2000, c. L-1 § 74.

223. "[L]abour boards often consider the impact of their decisions from a policy and practicality perspective when determining an appropriate decision on an illegal strike or lockout application. Previous case law or literal interpretations of the statute often end up being secondary considerations." *Edmonton Oilers*, 2012 CanLII 58944, para. 37.

224. *Id.* at paras. 39-42.

### A. THE PRACTICAL IMPACT OF DECLARING THE LOCKOUT ILLEGAL

The first reason given by the Board was that a declaration of an illegal lockout and an order to end the lockout in Alberta would have no practical effect.<sup>225</sup> The ALRB could only have ended the lockout in Alberta, affecting only two of the thirty NHL teams. Ending the lockout in Calgary and Edmonton would lead to the opening of training camp for roughly forty locked out players. The Board reasoned, however, that the players would not get paid until the season started, and the expired NHL collective bargaining agreement placed the league schedule at the complete discretion of the league.<sup>226</sup> Since the league would likely choose not to schedule a season for only two teams, the players in Alberta would not be paid even if the lockout were to end in Alberta.<sup>227</sup> The players would only be entitled to per diem payments owed during training camp.<sup>228</sup>

However, the Board's reasoning fails to stand up to scrutiny. Extending this argument to its logical conclusion leads to the absurd result that the NHL would be immune from all lockout laws, be they those of Alberta, the United States or elsewhere. The league would be able to apply "lockout pressure" on the players in the middle of a valid collective bargaining agreement by simply not scheduling a season. Yet this cannot be the reality for a variety of reasons. Principally, the expired CBA contained an express limit on the length of training camps.<sup>229</sup> In addition, the expired CBA also contained a no-lockout provision, that when read together with the scheduling section, meant that the NHL's scheduling discretion was not absolute.<sup>230</sup> The league's scheduling discretion is further limited by the very provision cited by the Alberta Board, with affirmative limits on length of season, number of games, travel, timing of games and a covenant of good faith consideration of NHLPA scheduling requests.<sup>231</sup> In sum, the Board's conclusion

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225. *Id.* at para. 39.

226. *Edmonton Oilers*, 2012 CanLII 58944, para. 39 (citing Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, at 83 (July 22, 2005)).

227. *Id.*

228. The players are entitled to per diem and lodging during training camp. Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, at 80 (July 22, 2005). Per diem was set for the 2007–08 season at \$92 per day and is to be increased by CPI each year. *Id.* at 99. Even under the 2007–08 rate, the value of per diem payment to the players between the scheduled start of training camp on September 21, 2012, and the eventual start of training camp for the actual shortened season on January 13, 2012 is \$10,580 dollars. Thus, even under the Board's reading the clubs would be liable for over ten thousand dollars, plus housing, per player.

229. *Id.* ("The duration of Training Camp for all Players who have qualified during the preceding Regular Season for at least 50 games credit for Pension Plan purposes shall not be more than 20 days, and shall not be more than 27 days for all other Players.").

230. *Id.* at 16. Further, the failure to schedule work as intended under a collective bargaining agreement in response to a negotiation breakdown should be construed a lockout. Thus, even if the NHL were given absolute schedule discretion in the CBA, failure to pay the Alberta players should still violate an illegal lockout order by the Alberta Board. See *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (finding the closure of shipping yards after bargaining impasse to prevent a strike during the employer's vulnerable high volume period was a lawful employer lockout).

231. Collective Bargaining Agreement Between National Hockey League and National Hockey

that the NHL could simply refuse to pay players in Alberta that are not locked out by simply failing to schedule a season is not supported by a close reading of the expired CBA or by sound labor policy.

The NHL's treatment of players who were injured before the lockout suggests that the Flames and Oilers would have been required to pay their players if the lockout were ruled illegal in Alberta. The league released a schedule for the 2012–13 season prior to implementing the lockout, and the NHL had periodically canceled groups of these games as the lockout progressed.<sup>232</sup> However, during the lockout, a number of previously injured players continued to be paid according to the original schedule for the 2012–13 season.<sup>233</sup> The Alberta Board's reading of the collective bargaining agreement assumes that if no games were scheduled (or played) for the Oilers and Flames players, then no payments would have been due.<sup>234</sup> Yet, all of the NHL owners were paying injured players their full salaries because those players could not have been lawfully locked out with the healthy players. If the ALRB had declared that the Flames and Oilers players also could not lawfully have been locked out, they would have been in the same position as the injured players—unable to be locked out, and thus due at least the minimum terms of their guaranteed contracts.<sup>235</sup> While the expired CBA did allow teams to

League Players' Association, at 83 (July 22, 2005).

232. See e.g., Pierre LeBrun, *NHL Cancels Games Through Jan. 14*, ESPN.COM (Dec 21, 2012), [http://espn.go.com/nhl/story/\\_id/8767262/nhl-cancels-additional-games-jan-14](http://espn.go.com/nhl/story/_id/8767262/nhl-cancels-additional-games-jan-14).

233. Scott Burnside, *Lockout Puts Garbutt's Dream on Hold*, ESPN.COM (Oct 17, 2012), [http://espn.go.com/nhl/story/\\_id/8513340/nhl-dallas-stars-ryan-garbutt-represents-lower-middle-class-players-caught-lockout](http://espn.go.com/nhl/story/_id/8513340/nhl-dallas-stars-ryan-garbutt-represents-lower-middle-class-players-caught-lockout); Steve Simmons, *Injured Players Being Paid in Full During NHL Lockout*, TORONTO SUN (Oct 28, 2012), <http://www.torontosun.com/2012/10/27/pronger-not-hurting-for-cash>.

234. This argument comes from a narrow reading of the Standard Player's Contract:

The Club hereby employs the Player as a skilled hockey Player for the term of \_\_ League Year(s) commencing the later of July 1, 20\_\_ or upon execution of this SPC and agrees, subject to the terms and conditions hereof, to pay the Player a salary of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

Payment of such Paragraph 1 Salary shall be in consecutive semi-monthly installments on the 15th and 30th day of each month following the commencement of the NHL Regular Season or following the dates of reporting, whichever is later (provided that the pay period shall not close more than three (3) days prior to payroll dates); provided, however, that if the Player is not in the employ of the Club for the whole period of the Club's NHL Regular Season Games, *then he shall receive only part of such Paragraph 1 Salary in the ratio of the number of days of actual employment to the number of days of the NHL Regular Season.*

Exhibit 1, Standard Player's Contract, Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, at 244 (July 22, 2005) (emphasis added).

235. *NHLPA Argues League Can't Lock Out Alberta*, *supra* note 196. What would be sufficient to satisfy the minimum term of those contracts is somewhat in dispute—it seems to be at least payment of guaranteed money and possibly providing training facilities and practices. The NHLPA complaint also asks for damages for loss of opportunity to play a “normal season.” Complaint at 10, *Edmonton Oilers*, 2012 CanLII 58944. One situation following the end of the lockout suggests that there is no contractual right for the opportunity to play, only a guarantee of payment. The new CBA contained a buy-out provision allowing teams to pay-off contracts in the summer of 2013 without salary cap implications, in preparation for the lower salary cap for the 2013–14 season. The Montreal Canadiens and New York Rangers had players they were so eager to buy-out that the teams told them they would not be playing anywhere during the shortened 2012–13 season. The teams were afraid the players would be hurt and ineligible for buy-outs in the summer, and did not want to risk the players playing even in the minor

assign players to other teams—meaning the teams could have forced players to play in the minor leagues or in Europe—they would have been required to at least pay the players' salaries.<sup>236</sup>

As the Board's premise that Alberta teams would not have been obligated to pay players after an illegal lockout declaration is questionable, its conclusion that such a declaration would have only limited effect is also undermined. Of the NHLPA's three provincial challenges to the lockout, the Alberta decision had the greatest possibility of affecting the lockout as a whole. NHL revenues were higher than ever, but the league's revenue gains since the 2004–05 lockout were primarily going to the players, whose salaries were also at record highs, and to the owners of the wealthiest teams with the largest, strongest fan bases.<sup>237</sup> The 2012–13 lockout was largely about the smaller market teams fighting for a system where they could compete and be more profitable, in order to grow the strength of the league as a whole.<sup>238</sup> The Calgary Flames and Edmonton Oilers are not small market teams by NHL standards, as the dedication of Canadian fans more than makes up for the small size of their markets.<sup>239</sup> The Flames and Oilers must, however, perform disproportionately well at the ticket-office and spend conservatively to stay profitable.<sup>240</sup>

The Alberta business model is in stark contrast to the financial situations in Ontario and Quebec, the sites of the NHLPA's other two 2012 Canadian challenges. The Toronto Maple Leafs and Montreal Canadiens are at the top of the NHL profit structure, with each grossing over \$165 million in revenues in 2011–12.<sup>241</sup> Toronto recently became the first hockey franchise in the world to be valued at one billion dollars.<sup>242</sup> So, aside from the differences in provincial labor law, an

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leagues. The NHL and NHLPA reached a special accelerated buy-out agreement for these two cases, avoiding the possibility of an arbitration to decide whether the players have a guaranteed right to play in their contracts. Sean Gordon, *NHL and NHLPA Reach Agreement on Accelerated Buyouts*, THEGLOBEANDMAIL.COM (Jan 15, 2013), <http://www.theglobeandmail.com/sports/hockey/nhl-and-nhlpa-reach-agreement-on-accelerated-buyouts/article7378852>.

236. Exhibit 1, Standard Player's Contract, Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, at 249 (July 22, 2005).

237. See discussion of post 2004–05 lockout finances *supra* Part I.

238. Dave Naylor, *Key to Ending Lockout is Helping Small Market Teams*, TSN (Sept 9, 2012), <http://www.tsn.ca/nhl/story/?id=405623>; Josh Cooper, *NHL Says It's Trying to Look Out for Small Markets*, USATODAY.COM (Oct 10, 2012), <http://www.usatoday.com/story/sports/nhl/2012/10/10/nhl-lockout-small-markets/1624137/>.

239. *NHL Team Values*, FORBES.COM, [http://www.forbes.com/nhl-valuations/list/#page:1\\_sort:6\\_direction:desc\\_search:\(last visited Jan 9, 2012\)](http://www.forbes.com/nhl-valuations/list/#page:1_sort:6_direction:desc_search:(last%20visited%20Jan%209%202012)(showing%20the%20Flames'%20and%20Oilers'%20revenues%20of%20$117%20million%20and%20$106%20million%20for%20the%202011-12%20season,%20which%20is%20impressive%20for%20the%2012th%20and%2014th-placed%20teams%20in%20the%20league)) (showing the Flames' and Oilers' revenues of \$117 million and \$106 million for the 2011–12 season, which is impressive for the 12th and 14<sup>th</sup>-placed teams in the league).

240. *NHL Attendance Report 2011–12*, ESPN.COM [http://espn.go.com/nhl/attendance/\\_/year/2012](http://espn.go.com/nhl/attendance/_/year/2012) (last visited Jan 9, 2012, 5:18 PM) (showing Calgary and Edmonton to be 7th and 19th in attendance, respectively); *2011–12 NHL Salaries by Team*, USATODAY.COM, <http://content.usatoday.com/sportsdata/hockey/nhl/salaries/team/2011> (last visited Jan 9, 2012) (showing Calgary and Edmonton to be 8th and 25th in payroll in the league, respectively).

241. *NHL Team Values*, *supra* note 239 (showing Leafs and Canadiens revenues of \$200 million and \$169 million for the 2011–12 season, good for 1st and 3rd in the league. The Ottawa Senators had revenues of \$113 million, 13th in the league).

242. Mike Ozanian, *Toronto Maple Leafs Are First Hockey Team Worth \$1 Billion*, FORBES.COM

illegal lockout declaration would affect particular provinces differently. For Toronto and Montreal, teams at the peak of NHL profitability, a potential illegal lockout declaration would merely be an annoyance. For Calgary, Edmonton and Ottawa, teams with small but loyal fan bases, an illegal lockout declaration—and the resulting obligation to pay players without generating any revenue from games—would be a real problem.<sup>243</sup> Thus, Alberta presented the best hope for the NHLPA to place actual pressure on the NHL teams during the lockout.<sup>244</sup>

## B. DISCOURAGING THE NHLPA FROM MAKING STRATEGIC JURISDICTIONAL ARGUMENTS

The second reason that the Alberta Board gave for not intervening was that it wished to discourage the NHLPA from making strategic arguments regarding ALRB jurisdiction.<sup>245</sup> As discussed above, the NHLPA, in its capacity as the bargaining agent for the players, questioned the discretion of the Board to supervise a lockout vote of the NHL's Alberta clubs.<sup>246</sup> Thereafter, the NHLPA supplied the NHL with a letter, reproduced in the opinion, in which it very carefully reserved the rights of its members to challenge a lockout in Alberta under the Code:

We believe that the NHLPA's position is quite clear.

The NHLPA does not assert for purposes of this [illegal lockout vote] that it has voluntary recognition relationships to which the *Code* applies with the Edmonton Oilers or the Calgary Flames. Further, the NHLPA does not assert that it has a voluntary recognition relationship to which the *Code* applies with the NHL.

The NHL's position before the Board seems equally clear. As we understand it, the NHL position is that the *Code* does not apply to the current relationship between the NHL and the NHLPA. The NHLPA will not be contesting that in these proceedings.

Notwithstanding the foregoing, the NHLPA takes no position in this proceeding about

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(Nov 28, 2012), <http://www.forbes.com/sites/mikeozanian/2012/11/28/nhl-team-values-2012-maple-leafs-first-hockey-team-worth-1-billion>.

243. For example, the Oilers were in a protracted negotiation with the City of Edmonton for a taxpayer funded arena. A previous deal fell through over a last minute demand by the Oilers for \$6 million in operating subsidies. \$6 million is a pittance compared to a half-season of team payroll. Canadian Press Sporting News, *Talks Back on to Build New Building*, SPORTINGNEWS (Dec 12, 2012), <http://aol.sportingnews.com/nhl/story/2012-12-12/edmonton-oilers-new-arena-talks-back-on-to-build-new-building>.

244. It is possible that the NHL would have paid the Edmonton and Calgary salaries to lessen the pressure on the NHL teams. In 2004, the NHL amassed a well-publicized \$300 million lockout fund, so the league was prepared to survive the lockout. Katie Fairbank, *Owners, Players Stash Cash as Lockout Looms*, SUNSENTINEL.COM (Aug 29, 2004), [http://articles.sun-sentinel.com/2004-08-29/sports/0408290313\\_1\\_nhl-players-association-trading-cards-union](http://articles.sun-sentinel.com/2004-08-29/sports/0408290313_1_nhl-players-association-trading-cards-union).

245. If nothing else, the ALRB seemed to be sincerely annoyed at the NHLPA for telling the NHL that it would not challenge the lockout vote, when eventually it did. Note that the ALRB went through an extensive finding of fact regarding the positions of the parties, taking up nearly half of the opinion, which clearly wasn't necessary given that they didn't decide the case on the merits. See *Edmonton Oilers*, 2012 CanLII 58944, paras. 10-29.

246. See discussion *supra* Part III.

the lawfulness of any post-September 15 lockout. *That issue is not currently before the Board. The NHLPA does not concede that the Code does not apply to the Alberta Teams, or that their employees have no rights under the Code.*<sup>247</sup>

This position should not be seen as contrary to the one advanced in the unlawful lockout application. The Board also considered the possibility that the NHLPA may have waived the players' right to challenge the lockout with this letter.<sup>248</sup> The question of whether a union can waive jurisdiction for its members may be an interesting one, but the NHLPA's actions did not raise it. The NHLPA directly and clearly reserved its right to challenge the lockout on behalf of its players.

There is, however, another aspect to the ALRB's position. It is possible that the NHLPA letter sent to the NHL was intentionally misleading. Perhaps the Board did not want the NHLPA to profit from misleading the NHL into failing to satisfy the Code. But this perspective ignores multiple key facts; notably that the NHL also changed its position on jurisdiction, first conceding it for the purpose of its mediation request and then denying it following the NHLPA's letter. Even more interestingly, the Board itself refused to take a position on jurisdiction—simply calling it ambiguous—and the Board is the body in charge of interpreting and enforcing the Code.<sup>249</sup> If the Board refuses to make a finding on jurisdiction, how can it fault the parties for arguing both sides of an ambiguous issue? Given the widely accepted obligation of attorneys to raise available arguments, often including inconsistent or "in the alternative" arguments, the Board's reprimand on this point is misplaced.<sup>250</sup>

### C. THE RELEVANCE OF ADEQUATE UNION REPRESENTATION

The third reason given by the Board was essentially a functional compliance argument. It stated that the policy behind including statutory prerequisites to lockouts in the Code is to "encourage rational discussion and good faith bargaining."<sup>251</sup> The Board was satisfied that the parties had sufficiently bargained and were aware of the serious consequences of escalating the conflict to a lockout. As a result, the Code's lockout preconditions were not as important under the circumstances.<sup>252</sup>

It is significant that the NHL lockout was in compliance with the National Labor Relations Act and satisfied the U.S. lockout preconditions. However, the Board did not employ comity reasoning and never mentioned the NLRA or the relative merits

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247. Letter from J. Robert W. Blair to David Ross, *Edmonton Oilers*, 2012 CanLII 58944, para. 25 (emphasis added).

248. *Edmonton Oilers*, 2012 CanLII 58944, paras. 33, 40.

249. See generally Alberta Labour Relations Code, 2000 R.S.A. ch. L-1, § 12.

250. Cf. Law Society of Alberta, *Code of Conduct*, § 4.01 Commentary ("In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.").

251. *Edmonton Oilers*, 2012 CanLII 58944, para. 41.

252. *Id.*

of American labor safeguards.<sup>253</sup> Not only was the Code designed to “minimize precipitous, ill-considered reliance on . . . economic weapons,” it was designed to do so in a specific way.<sup>254</sup> For example, the Alberta Board might accept an NLRB-supervised lockout vote in lieu of the ALRB vote required by the Code, because both votes satisfy the legislative policy of dissuading any casual use of economic labor weapons. If the thirty teams voted unanimously to lock the players out, then it must be the case that the Oilers and Flames voted to lock the players out in Alberta. The Code, however, also requires mediation and a cooling off period if mediation fails. In its decision, the Board did not offer justification based on the NHL-NHLPA bargaining history to functionally satisfy these two Alberta lockout prerequisites.<sup>255</sup>

The ALRB likely failed to offer specifics because it did not want to create bad precedent. The Board did not actually refrain from intervening because the NHLPA had a sufficient bargaining time before the lockout, it refrained because it did not want to get involved in the lockout. The strong implication from this third consideration is that the specifics of the Code do not matter if the employees in question are competently represented. That position is not the design of the Code, nor is it a satisfactory precursor to a lockout in Alberta according to the Code. If lockout prerequisites were only relevant when dealing with unsophisticated parties, then the Code would reflect that policy, making the NHL lockout lawful, rather than simply allowing the ALRB to avoid issuing a remedy.

#### **D. THE EFFECT OF BOARD INTERVENTION ON THE ONGOING BARGAINING RELATIONSHIP**

The ALRB’s final reason for not intervening was also the NHL’s primary argument against ALRB jurisdiction: there is an aspect of sports leagues and the sports bargaining process (i.e., the need for collective action) that prohibits the normal application of labor and employment regulation in Canadian provinces. It is true that the need for cooperation within sports leagues has been interpreted to create a non-statutory labor exemption from antitrust laws in the United States.<sup>256</sup> But the cooperative nature of North American sports leagues does not exempt these leagues from labor rules applying to multi-employer bargaining units in the U.S., so

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253. This would be the strongest argument for deciding not to intervene. I believe that there is merit in the CRT opinion in the 2012 case, arguing that the Quebec Code assumes at its foundation that it is the only labor protection available. The involvement of the NLRA and the ongoing bargaining relationship arguably allows for the Board not to intervene on comity concerns. *Armstrong*, 2012 QCCRT 445. However, this argument only works if the Board also exerts jurisdiction and warns that it might reconsider its decision in the future. This is precisely what the CRT did in 2012 and what the BCLRB did in *Orca 3* in 2007.

254. *Edmonton Oilers*, 2012 CanLII 58944, para. 41.

255. That is not to say that they do not exist, the Alberta Board simply did not use this argument to justify its decision. In fact, the Ontario Labour Board refused to begin its own conciliation process in deference to the NLRB mediation services. See discussion *supra* Part III.A.

256. See e.g., *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979).

it would not be possible for Canadian employers to be exempted from Canadian labor laws based on their inclusion in a U.S. sports related joint-venture.<sup>257</sup> First, Canada is a sovereign nation, not preempted by the U.S. labor system. Second, the U.S. labor system is not a unified national system; it includes state and local labor and employment laws amending and changing the national rules on a local level.

Nevertheless, NHL attorney Peter Gall stressed this point in a statement following oral arguments in Alberta: "If we get involved with one team it's going to interfere with the league-wide relationship . . . . Common rules governing teams and players are essential to running the NHL."<sup>258</sup> The Board agreed with Gall, finding that any intervention into the ongoing bargaining relationship would be detrimental and would "effectively remove the Calgary Flames and Edmonton Oilers teams and players from the league-wide collective bargaining process."<sup>259</sup> Thus, the ALRB decided that, whether or not it had jurisdiction, intervention into the NHL-NHLPA bargaining relationship would be unwise.

Principally, the Board cited *Orca 3* for the proposition that Board intervention would effectively remove the teams from the NHL-NHLPA bargaining unit. The Board cited at length from that opinion, largely from the section on the appropriateness of the proposed NHLPA-BC bargaining unit, purporting to simply be "following the same thought process," before concluding:

Whether via certification of a separate unit (as with *Orca Bay*) or by way of the application of Alberta's strike-lockout provisions, the result would be to carve one or two teams out from the league-wide structure and replace it with their own individualized collective bargaining relationship. Given the unique nature of professional sports and more specifically the NHL and its structure in particular, this makes no labour relations sense.<sup>260</sup>

Even if *Orca 3* stood for the proposition that certification of the NHLPA-BC would remove the Canucks players permanently from the larger NHL bargaining relationship, the Board failed to provide a basis for accepting the application of this reasoning to an illegal lockout charge. Certifying a separate bargaining unit should be a more stringent standard for action than deciding the legality of a lockout actually underway. Certification requires a determination of the appropriateness of the unit and the ongoing regulation of the bargaining relationship. An illegal lockout declaration could simply return the employees to work and force the resumption of bargaining; this was the result of the MLB umpire and the NBA referee cases in Ontario. Yet, the Board provided no comparison of the standards or requirements to justify the application of *Orca 3* to the NHLPA's illegal lockout charge.

Moreover, the ALRB's reliance on *Orca 3* relies on a basic misunderstanding of that opinion. As noted above, the British Columbia Labour Relations Board did not

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257. See discussion *supra* Part II.A; *Silverman*, 880 F.Supp 246.

258. *Alberta Labour Board Reserves Decision on Oilers and Flames NHL Lockout Appeal*, *supra* note 192.

259. *Edmonton Oilers*, 2012 CanLII 58944, para. 42.

260. *Edmonton Oilers*, 2012 CanLII 58944, para. 44.



find jurisdiction ambiguous in *Orca 3*, as the ALRB had in the 2012 case.<sup>261</sup> Further, the BCLRB did not find that intervention would effectively remove the Vancouver Canucks from the bargaining unit.<sup>262</sup> The BCLRB did find that certification was inappropriate *at that time* for a separate NHLPA-BC bargaining unit, but it left that possibility open for the future.<sup>263</sup> Thus, it is particularly unsatisfying that the ALRB chose to adopt the logic of *Orca 3*, without a more rigorous explanation, given that the ALRB appears to have misunderstood that decision.

There is a more relevant comparison than *Orca 3* through which the ALRB's concern for interrupting the NHL-NHLPA bargaining relationship can be evaluated: the analogous case of U.S. state labor law regulation of multistate bargaining relationships. The Supremacy Clause of the U.S. Constitution preempts state labor laws that actually conflict with the NLRA.<sup>264</sup> The Supreme Court has interpreted NLRA preemption broadly, prohibiting states from legislating either in areas clearly covered by the Act or areas that Congress intended to remain unregulated.<sup>265</sup> Regulation of the use of economic weapons like lockouts is at the core of the NLRA and is clearly preempted from state regulation.<sup>266</sup> This does not end the inquiry, however. First, the ALRB did not justify its decision by citing the specifics of U.S. preemption doctrine or by identifying lockout activity as a core activity especially deserving of deference to the NLRA. The ALRB characterized Board intervention as effectively severing the Alberta teams from the league structure, calling into question the application of the Code to *all* aspects of the NHL-NHLPA bargaining relationship.

261. *Orca 3*, 2007 BCLRBD 172, para. 29 (Can. BC L.R.B.) ("The Applicants do not take issue, in their application for leave and reconsideration, with the Board's jurisdiction to grant the application for certification: they take issue with whether the Board should have exercised its discretion within that jurisdiction to grant the application.").

262. See *id.* at para. 75 ("The Original Decision concludes that the collective bargaining relationship between the NHL and the NHLPA will not be 'inoperably damaged' by the certification of the BC-NHLPA; however, we find the Applicants need not establish inoperable damage in order to persuade us that certifying a bargaining unit of Canucks players only is inappropriate, when considered in the operational and labour relations context of the employer, Orca Bay.").

263. *Id.* at para. 77 ("All three elements—the employer Orca Bay, the union BC-NHLPA, and the employee Canuck players—are well served by their current league-wide bargaining structure. This is a crucial factor in our finding that the applied for bargaining unit is inappropriate. If this circumstance were to change, such that either or both parties were no longer well served by the existing bargaining structure, it may be that we would have to revisit our decision.").

264. *Brown v. Hotel & Rest. Employees & Bartenders*, 468 U.S. 491, 501 (1984).

265. *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959) ("When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 155 (1976) ("[T]he Union's refusal to work overtime is peaceful conduct constituting activity which must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated . . .").

266. See *Am. Ship Bldg. Co. v. N. L. R. B.*, 380 U.S. 300, 317 (1965) (describing the accepted use of economic weapons, particularly lockouts, by Congress in creating a system for employer-employee bargaining as coequal adversaries).

U.S. preemption doctrine does not require multi-state bargaining units to be free from state intervention under the NLRA. The Federal Occupational Health and Safety Act (OSHA) specifically allows distinct state OSHA plans. Twenty-five states have such plans in place, and thirteen of the twenty-three American NHL teams play in those states.<sup>267</sup> State right-to-work laws limit the ability of unions to require union membership or dues payments from employees, a regulation that drastically affects union bargaining power by making it harder to raise funds and strike.<sup>268</sup> Michigan recently became the twenty-fourth right-to-work state, with seven of the twenty-three American NHL teams subject to right-to-work laws.<sup>269</sup> As a final example, the Fair Labor Standards Act allows states to set a minimum wage exceeding the Federal minimum wage.<sup>270</sup> Changes in minimum wages affect bargaining power and wage scales throughout the labor force and might significantly affect a multi-state bargaining unit by mandating raises for only part of the unit. These three types of state regulations exemplify the ways that state regulation can divide multi-state bargaining units within the NLRA system.

The case of *Williams v. National Football League* demonstrates the applicability of state regulation to the sports bargaining context and the high degree of jurisdictional intervention acceptable under the NLRA.<sup>271</sup> Kevin Williams, a member of the Minnesota Vikings, was among five NFL players who failed a performance-enhancing drug test that had been negotiated and incorporated into the CBA between the NFL and the NFL players' association.<sup>272</sup> Williams allegedly ingested a prohibited substance, bumetanide, which had been included in an over-the-counter dietary supplement without warning.<sup>273</sup> Despite Williams' ignorance, he was still subject to discipline under the NFL drug policy's strict liability standard.<sup>274</sup> Williams then challenged the legality of the drug test under Minnesota state labor and employment laws.<sup>275</sup>

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267. The thirteen teams are the Phoenix Coyotes (AZ), the Anaheim Ducks (CA), the Los Angeles Kings (CA), the San Jose Sharks (CA), the Chicago Blackhawks (IL), the Detroit Red Wings (MI), the Minnesota Wild, the New Jersey Devils, the New York Islanders, the New York Rangers, the Buffalo Sabres (NY), the Carolina Hurricanes (NC) and the Nashville Predators (TN). *State Occupational Safety and Health Plans*, OSHA.GOV, <http://www.osha.gov/dcsp/osp/index.html> (last visited Feb. 18, 2013).

268. See *NLRB v. North Dakota*, 504 F.Supp.2d 750, 752 (N.D.D. 2007).

269. The seven teams are the Phoenix Coyotes (AZ), the Florida Panthers, the Tampa Bay Lightning (FL), the Detroit Red Wings (MI), the Carolina Hurricanes (NC), the Dallas Stars (TX) and the Nashville Predators (TN). William J. Bennett, *A Victory for Right-to-Work Laws*, CNN.COM (Dec 13, 2012), <http://www.cnn.com/2012/12/12/opinion/bennett-michigan-unions>.

270. See generally *Minimum Wage Laws in the States*, United States Department of Labor, <http://www.dol.gov/whd/minwage/america.htm> (last visited Jan 23, 2012).

271. *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009).

272. *Id.* at 870.

273. *Id.* at 871.

274. *Id.* at 872.

275. *Id.* at 872-73. Though the named plaintiff was Kevin Williams, his Vikings teammate Pat Williams (no relation) was also a plaintiff in the case. The Minnesota laws were Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA), which provided minimum employee protections before drug testing could be used against an employee, and Minnesota's Consumable Products Act (CPA), which prohibits the disciplining of an employee for consuming legal products away from the

In *Williams*, the NFL's two principle arguments were (1) uniform interpretation and administration of the drug policy were required to preserve the integrity of the NFL, and (2) the players had waived their right to challenge the drug testing policy under state law when the union agreed to it.<sup>276</sup> The Eighth Circuit denied the contention that league integrity was a concern sufficient to displace state labor laws.<sup>277</sup> The court then dismissed the NFL's waiver argument, finding that Minnesota state law created protection independent of the NFL CBA, and that protection had not been waived when the players' agreed to be bound by the CBA.<sup>278</sup> In other words, the Eighth Circuit agreed that a state labor policy protection granting minimum standards greater than the protections offered by the NLRA was not preempted in the sports bargaining context.<sup>279</sup>

In *Williams*, the Eighth Circuit confirmed that collective bargaining does not displace all state labor protections. States regulate employment in the sports bargaining context where not precluded by the NLRA. While states do not regulate lockouts, it is Federal preemption doctrine that prohibits them from doing so. As demonstrated by state regulation of other areas of labor and employment law, U.S. states do not share the ALRB's concern for dividing the bargaining unit. Since the ALRB is not limited by U.S. preemption doctrine, nothing about the NLRA administration of the NHL-NHLPA bargaining relationship provides a basis for the Alberta Board to decline jurisdiction over this dispute. Even if preemption were a persuasive consideration against ALRB intervention in the lockout, it does not provide a basis for the ALRB to decline jurisdiction over the entire bargaining relationship.

## CONCLUSION

The ALRB was within its discretion not to intervene in the 2012–13 NHL lockout. Particularly in October, 2012, when a deal could still have been reached to save a complete season, there were political and policy reasons not to intervene.

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place of employment. *Id.* at 874, 878. Following a temporary restraining order and removal, the Minnesota District Court found that the DATWA and CPA were not preempted by federal labor law, and remanded the cases to state court for determination on the merits. The District Court found that Minnesota's labor and employment law did not conflict with the NLRA, and thus were a matter of state public policy, more appropriately determined in state court. *Id.* at 873. On appeal, the Eighth Circuit considered the issue of federal preemption of the state laws *de novo* and affirmed the opinion in all respects. *Id.* at 873, 878, 880.

276. *Id.* at 873, 880.

277. See *Id.* at 878 ("[T]here [is not] any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law. . . . Clearly, § 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law.") (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-12 (1985)).

278. *Id.* at 880.

279. *Williams*' case was eventually dismissed because the state court found that bumetanide was not a drug within the meaning of the DATWA. See *Williams v. Nat'l Football League*, 794 N.W.2d 391 (2011). The important aspect of this case is not the ultimate result, but rather the Eighth Circuit's acceptance of state labor laws' involvement in sports collective bargaining relationships under the NLRA.

Arguably, the most persuasive policy concern was the desire not to have the “tail wag the dog.” The Alberta teams admittedly comprise a small portion of the NHL, and the Alberta Board may have legitimately wanted to avoid changing the course of a \$3.3 billion-a-year industry operating largely in the U.S. The Board likely also had valid concerns about respecting the discretion and the standards of the NLRA and allowing the work stoppage to run its course without disruption.

But the consideration of political issues should not have been the only driving force in the ALRB’s decision. Labor boards are trusted to protect employees from large corporations, so political pressure should not give the NHL carte blanche to disregard Alberta’s labor laws. The ALRB decision was inadequate in three principal respects: (1) the Board ignored the role that provincial policy should play in the setting of local labor standards, even for American organizations operating in Alberta; (2) the Board failed to exert any pressure on the NHL and NHLPA to reach a quick agreement; and (3) the Board placed far too much weight on the misguided notion that Albertan jurisdiction would harm or dismantle the NHL-NHLPA bargaining relationship.

Regarding the first two points, by failing to decide the jurisdictional question, the Board left unresolved the question of whether it had the power to intervene in the future. It is not clear if the Board would have reconsidered its decision had the parties reached an impasse and lost another season. A better solution could have been to find jurisdiction to apply the Code, while also finding it premature to intervene at that point.<sup>280</sup> By characterizing the role of the Code as raising the minimum protections afforded to bargaining unit members located in Alberta, the ALRB would have forced the NHL to be cognizant of Alberta labor policy in the future. The Board would have acknowledged the labor policy directive of the legislature and motivated the NHL to work toward a deal. This result would have provided clarity and would have helped, rather than hindered, the ongoing bargaining relationship between the NHL and the NHLPA.

Moving to the third point, the Board failed to adequately consider the possibility that the NHL and NHLPA could effectively bargain under a system consistent with both NLRA and ALRB rules. Specifically, the Board failed to point to any conflict, either practical or ideological, that precluded the application of both the Code and the NLRA.<sup>281</sup> At its heart, this was a very simple dispute. The NLRA allows the use of lockouts, a powerful coercive tool, in a wider range of situations than does the ALRB. Neither system is wrong; each just provides different levels of employee protections from lockouts. The NHL and the ALRB treated these protections as mutually exclusive. In effect, they reasoned that the sports league aspect of the business requires that only one of these systems can govern. They

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280. This is not to say that the Board should not have intervened, but that it was reasonable not to do so at that time. It might also have applied more pressure by immediately declaring the lockout illegal, as the OLRB did in the Umpire case.

281. See Findings and Declaration of Policy, 29 U.S.C. § 151 (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . .”).

treated labor law as a cooperative part of the league, like the requirement that all teams agree to play with the same number of players.

Instead, the NLRA and Alberta Code lockout preconditions can follow the template laid out by U.S. state wage laws and OSHA. Both treat consistent employee protections as additive. For example, if Fed-Ex negotiates a minimum pay scale for a multistate bargaining unit of drivers, and if one of those states has a higher minimum wage than the negotiated scale, Fed-Ex would be required to pay the higher of those two minimums in any particular state. Similarly, there is no reason in principle why the NHL cannot be forced to comply with both NLRA and ALRB standards before implementing a lockout.<sup>282</sup> This is particularly true considering that the NHL *did* comply with both the NLRA and the Alberta Code during the 2004–05 lockout.

The NHL's previous compliance neither fractured the bargaining unit, nor ruined the integrity of the league. It did force the NHL and NHLPA to sit down with a mediator from Alberta and file some paperwork. It required a lawyer from the NHL to read the Alberta Code and determine how to comply with it. In fact, the NHL had nearly complied with the Code before failing to hold a necessary lockout vote in 2012. While the ALRB might have any number of political or policy reasons for declining to declare the lockout illegal *at that time*, the Alberta Board's decision took the unnecessary step of making Alberta labor law irrelevant. It is this aspect of the ALRB's decision that is most disappointing, as the NHL now has no reason to comply with the Alberta Code or the Alberta legislature's policy directives.

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282. For instance, if the NLRA prohibited a cooling period between mediation and the lockout vote and the Code required a cooling period, the two preconditions would be impossible to satisfy together. Here the preconditions are entirely consistent.

